(38)

No. 01-521-CFX Title: Republican Party of Minnesota, et al., Petitioners
v.
Suzanne White, Chairperson, Miinesota Board of Judicial Standards, et al.

Docketed:
September 26, 2001 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Sep 24 2001	Petition for writ of certiorari filed. (Response due October 26, 2001)
	Oct 9 2001	Brief amicus curiae of Republican National Committee and Democratic National Comm. filed.
	Oct 26 2001	Brief of respondents Verna Kelly, et al. in opposition filed.
	Nov 7 2001	DISTRIBUTED for Conference of November 21, 2001
	Nov 7 2001	Reply brief of petitioners Republican Party of Minnesota, et al. filed.
	Nov 26 2001	REDISTRIBUTED for Conference of November 30, 2001
	Dec 3 2001	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT March 26, 2002. **********
	Jan 16 2002	Joint consent to the filing of amicus briefs by seven specified amici received.
	Jan 17 2002	Brief amici curiae of State Supreme Court Justices filed.
	Jan 17 2002	Brief amicus curiae of American Center for Law and Justice filed.
	Jan 17 2002	Brief amicus curiae of Chamber of Commerce of the United States filed.
	Jan 17 2002	Brief amicus curiae of Public Citizen filed.
	Jan 17 2002	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jan 17 2002	Joint appendix filed.
	Jan 17 2002	Joint appendix in two volumes
	Jan 17 2002	Brief of petitioners Republican Party of Minnesota, et al. filed.
	Jan 17 2002	Brief of petitioners Gregory Wersal, Kevin Kolosky, and Campaign for Justice filed.
	Jan 17 2002	Brief of Philip Krinkie and Eighteen State Legslators filed.
	Jan 17 2002	Brief amici curiae of Idaho Conservation League, et al. filed.
	Feb 1 2002	CIRCULATED.
	Feb 19 2002	Brief amicus curiae of American Bar Association filed.
	Feb 19 2002	Brief of respondents Verna Kelly, et al. filed.
	Feb 19 2002	Brief amicus curiae of Missouri Bar filed.
	Feb 19 2002	Brief amici curiae of California, et al. filed.
	Feb 19 2002	Brief amici curiae of Brennan Center for Justice at NYU School of Law, et al. filed.
	Feb 19 2002	Brief amicus curiae of Minnesota State Bar Association filed.
	Feb 19 2002	Brief amicus curiae of Ad Hoc Committee of Former Justices and Friends filed.
	Feb 19 2002	Brief amicus curiae of Conference of Chief Justices filed.

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No. 01-521-CFX

Entry	Date	Proceedings and Orders
	Feb 19 2002	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Feb 19 2002	Brief amicus curiae of Pennsylvanians for Modern Courts filed.
	Mar 5 2002	Record filed.
	Mar 7 2002	Motion of petitioners for divided argument filed.
	Mar 12 2002	Reply brief of petitioners Republican Party of Minnesota, et al. filed.
	Mar 14 2002	Reply brief of petitioner Gregory Wersal, Kevin Kolosky, and Campaign for Justice filed.
	Mar 15 2002	Motion of petitioners for divided argument DENIED.
	Mar 26 2002	ARGUED.

Supreme Court, U.S.
FILED

(1)

No. 01- 01 521 SEP 24 2001

In The
Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

KELLY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Petition for a Writ of Certiorari

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September 24, 2001

175.00

James Bopp, Jr. and Thomas J. Marzen are Counsel for the following Petitioners: Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, and Michael Maxim.

QUESTIONS PRESENTED

1. Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2. Whether the severe burdens imposed by various provisions of the Minnesota Code of Judicial Conduct unconstitutionally impinge on the right of political parties to endorse candidates for elective judicial office in violation of the freedom of speech, freedom of association, and equal protection of law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

3. Whether the provision of the Minnesota Code of Judicial Conduct that forbids a candidate for elective judicial office from attending or speaking at any political party gathering – while permitting such a candidate to attend or speak at gatherings of all other organizations – unconstitutionally impinges on the freedom of speech, freedom of association, and equal protection of the law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, Michael Maxim, Gergory F. Wersal, Campaign for Justice, and Kevin J. Kolosky; *Plaintiffs-Appellants*;

Verna Kelly was, in her official capacity, Chairperson of the Minnesota Board of Judicial Standards, and has been succeeded by Barry M. Lazarus, present Chairperson of the Minnesota Board of Judicial Standards; Edward J. Cleary, in his official capacity as Director of the Minnesota Office of Lawyers Professional Responsibility; Charles E. Lundberg, in his official capacity as Chair of the Minnesota Lawyers Professional Responsibility Board; *Defendants-Appellees*.

CORPORATE DISCLOSURE STATEMENT

In accord with Supreme Court Rule 29.6, Petitioners state that the Young Republican League of Minnesota is a nonprofit corporation, it has no parent corporation, and there is no publically held company owning 10% or more of stock in it. The Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Minnesota College Republicans, Campaign for Justice, Minnesota African American Republican Council and Muslim Republicans are not corporations, but are associations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals denying petitions for rehearing and rehearing en banc, App. 130a, is not yet reported. The opinion of the court of appeals, App. 1a-93a, is reported at 247 F.3d 854, U.S. App. LEXIS 30781 (April 30, 2001). The opinion of the district court, App. 94a-129a, is reported at 63 F. Supp. 2d 967.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 30, 2001. App. 7a. Petitions for rehearing and rehearing en banc were denied on June 26, 2001. App. 130a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances. [U.S. Const. amend. I.]

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. Const. amend. XIV, § 1.]

Title 42, Section 1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. [42 U.S.C. § 1983 (2001).]

Pursuant to Supreme Court Rule 14.1(f), Canon 5 of the Minnesota Code of Judicial Conduct is reprinted at App. 131a-135a.

STATEMENT OF THE CASE

Petitioners, Gregory F. Wersal, a judicial candidate seeking election to the Minnesota Supreme Court, and the Republican Party of Minnesota ("the Republican Party") brought this action on February 28, 1998, in the United States District Court for the District of Minnesota against representatives of the Minnesota Board of Judicial Standards ("BOJS") and the Minnesota Office of Lawyer Professional Responsibility ("OLPR") seeking to enjoin enforcement of certain Minnesota Judicial Conduct Code Canons:

(1) The "announce" clause of Canon 5A(3)(d)(i), App. 133a-134a, which prohibits candidates for elective judicial office from "announc[ing] their views on disputed legal or political issues;"

(2) The "endorsement" clauses of Canon 5A(1)(d), App. 132a, and of Canon 5B(2), App. 135a, that forbid judicial candidates and their campaign committees "to seek, accept, or use" endorsements from political party organizations;

(3) The "attend and speak" clauses of Canon 5A(1)(d), App. 132a, which prohibits judicial candidates from "attending political gatherings," and of 5B(1)(a), App. 134a, which forbids judicial candidates to speak at political party gatherings.[1]

Joining Wersal and the Republican Party as Plaintiffs were: his campaign committee, Campaign for Justice; his wife, Cheryl Wersal; his brother, Mark E. Wersal; an unaffiliated, unrelated supporter of his candidacy, Corwin C. Hulbert; an individual who sought endorsement for Wersal by the Republican Party, Michael Maxim; another judicial candidate, Kevin J. Kolosky; and various associations affiliated with the Republican Party.

The district court denied a preliminary injunction, and the United States Court of Appeals for the Eighth Circuit affirmed. An injunction pending appeal was sought from this Court which was denied by Circuit Justice for the Eighth Circuit, Justice Clarence Thomas. Thereafter, the District Court granted defendants' motion for summary judgment and the Eighth Circuit affirmed in a 2-1 decision. Motions for rehearing and rehearing en banc were subsequently denied and the Eighth

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[1]Petitioners also initially challenged other Canons that they do not now petition this Court to review: Canon 5A(1)(a), App. 132a, which prohibits judicial candidates from identifying themselves as members of a political party organization, and Canon 5B(2), App. 134a, which prohibits judicial candidates from soliciting campaign contributions.

Circuit's decision is now being presented to this Court for review.

A. The Nature of the Case.

Petitioner Gregory F. Wersal, an attorney licensed in Minnesota, first campaigned for the office of Associate Justice of the Minnesota Supreme Court in February, 1996. Under the Minnesota Constitution, art. 6, § 7, all state judicial offices are filled by popular election.

During his 1996 campaign, Wersal, his wife Cheryl Wersal, his brother Mark Wersal, Corwin Hulbert, members of his campaign committee, and other members of the Republican Party of Minnesota and its affiliated associations on behalf of Wersal attended gatherings of the Republican Party and its affiliated associations, spoke at these gatherings, announced that Wersal was in favor of strict judicial construction and was critical of certain Minnesota Supreme Court decisions, and sought the endorsement of the Republican Party and its affiliated organizations.

An ethics complaint was filed with OLPR against Wersal based on an alleged violation of Canon 5A(3)(d)(i) of Minnesota Code of Judicial Conduct, which prohibits any candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues." App. 133a-134a. Minnesota attorneys are subject to discipline if they violate the Canons while campaigning for judicial office. Minnesota Rule of Professional Conduct § 8.2. Wersal withdrew his candidacy because the threat of such ethics complaints placed his livelihood as a lawyer and the well-being of his family in jeopardy. The OLPR eventually exonerated Wersal, stating its doubts regarding the constitutionality of the "announce" clause. Appendix to Brief of Appellants in Eighth Circuit ("Eighth Cir. App.") at 1643-1648.

In January of 1997, Wersal declared again for the office of Associate Justice of the Minnesota Supreme Court in the 1998

election. Once again, Wersal announced that he was in favor of strict construction of the Constitution, was critical of certain decisions of the Minnesota Supreme Court, and sought endorsement from the Republican Party. Once again, Wersal, his wife, his brother, and associates and members of his campaign committee attended Republican Party gatherings on behalf of Wersal's candidacy, spoke in favor of his candidacy at these gatherings, announced his views in favor of strict construction and against some Minnesota Supreme Court decisions, and sought Republican Party and its affiliated organizations' endorsements.

In December of 1997, however, the Minnesota Supreme Court amended Canon 5, among other things, to add a clause to 5B(1)(a) that forbids judicial candidates from speaking to political party gatherings and to add clauses to 5A(1)(d) and 5B(2) that forbid judicial candidates and their campaign committees from seeking, accepting, or using political party endorsements. *See* App. 98a-101a. These new restrictions placed the manner in which Wersal was conducting his campaign in serious doubt. Moreover, the Canons placed the conduct of family, friends, associates, and members of his campaign organization acting on behalf of his candidacy in doubt by virtue of Canons 5A(3)(a) and (c), which require the candidate to encourage family members to adhere to the same standards of political conduct as the candidate and which forbid the candidate from authorizing or knowingly permitting any other person "to do for the candidate what he candidate is prohibited from doing" for him or herself.

To avoid violating these Canons, Wersal requested an advisory opinion from OLPR on February 9, 1998, asking whether OLPR intended to enforce certain aspects of the Canons in conjunction with his campaign. Eighth Cir. App. at 1754-1757. OLPR responded with a February 24, 1998, advisory opinion stating that it would enforce Canon 5A(1)(d) and

5B(1)(a), which forbids judicial candidates to attend or speak at political party gatherings, and Canon 5A(1)(d), which forbids judicial candidates for seeking, accepting, or using political party endorsements. However, OLPR was not willing to state whether it would enforce the clause of Canon 5A(3)(d)(i) that forbids candidates from announcing their views on disputed legal or political issues, but instead stated only that it "continues to have significant doubts as to whether or not this provision would survive a facial challenge to its constitutionality under the First Amendment to the United States Constitution." Eighth Cir. App. at 1758-1761. Wertzel, the Republican Party, and others then commenced this action, challenging multiple aspects of Canon 5 in the district court.

After the preliminary injunction sought by the Plaintiffs was denied, the Republican Party held its June 18-20, 1998 State Convention. At the convention, Petitioner Michael Maxim moved that the Republican Party endorse Wersal for Supreme Court Associate Justice. In accordance with Canon 5's requirements, Wersal did not attend the convention, nor did any of his family, members of his campaign committee, or any other of his agents.

Maxim spoke to the convention in favor of Wersal's endorsement by the Republican Party. Maxim, however, had not met or talked with Wersal about the Republican Party endorsement because he understood that such communications would constitute a violation of Canon 5 and subject Wersal to sanctions. Accordingly, Maxim was severely hampered in his advocacy of Wersal's endorsement because he did not have the benefit of first-hand information from Wersal about his beliefs, fitness, and qualifications for office and had to rely on secondary sources. Amid concerns about whether an endorsement was legal and in part due to the absence of Wersal, his family and members of his campaign committee, Maxim's motion to

endorse Wersal was narrowly defeated and Wersal was subsequently defeated in the primary.

During the 2000 election cycle, Wersal once more ran for office of Associate Justice of the Minnesota Supreme Court. Although he was prohibited from seeking an endorsement by the Republican Party and its affiliated organizations by virtue of Canon 5A(1)(d), the Republican Party nevertheless endorsed his candidacy, a fact widely reported in state newspapers. Shortly thereafter, Wersal's campaign committee filed a separate "as applied" challenge to Canon 5 in a federal district court, seeking authorization to send copies of newspaper articles about the Republican Party endorsement to potential contributors. The district court dismissed the action on the grounds of res judicata, citing the lower court decision in this case. *Greg Wersal for Supreme Court Comm. v. Lundberg*, No. 00-1685 (PAM/JGL), slip op. at 7 (D. Minn. July 28, 2000).

One month later, Wersal's general election opponent began criticizing Wersal for receiving the Republican Party endorsement – an endorsement that Wersal did not seek. Wersal sought another advisory opinion from OLPR on whether Wersal could respond to these attacks which, by necessity, would require Wersal to mention the endorsement. OLPR responded that any response by Wersal to the attacks that mentioned the endorsement would violate Canon 5. *Wersal v. Lundberg*, No. 00-2103 (MJD/JGL), slip op. at 2 (D. Minn. Sept. 14, 2000). Wersal, therefore, filed another action in federal district court seeking relief from Canon 5 to permit him to respond to these attacks. Once again, the district court dismissed the action, finding that the claims were resolved by the district court decision in this case and threatening to sanction Wersal. *Id.* at 7. Wersal lost in the general election.

Both of these separate actions were appealed to the Eighth Circuit, and the Eighth Circuit has stayed both appeals pending a decision in this case. *Greg Wersal for Supreme Court Comm.*

v. Lundberg, No. 00-2962-MNST (8th Cir. Aug. 2, 2000); *Wersal v. Lundberg*, No. 00-3494-MNST (8th Cir. Oct. 13, 2000).

B. The Proceedings Below.

Petitioners commenced this action on February 27, 1998, and moved for a preliminary injunction. The district court denied Petitioners' Motion for a Preliminary Injunction on March 9, 1998, *Republican Party v. Kelly*, 996 F. Supp. 875 (D. Minn. 1998), and, on October 28, 1998, the court of appeals affirmed in a 2-1 per curiam decision. *Republican Party v. Kelly*, 163 F.3d 602 (8th Cir. 1998). An injunction pending appeal was sought from this Court which was denied.

On September 14, 1999, the district court granted Respondent's Motion for Summary Judgment and dismissed the action. App. 94a-129a. The district court found that the state's compelling interest in the independence and integrity of its judiciary justified Canon 5's prohibitions. App. 108a-118a. In addition, the district court applied a narrowing interpretation to the "announce" clause to save it from constitutional invalidity, construing it to apply only to matters likely to come before the candidate if elected as judge. App. 123a-129a.

On April 24, 2001, the Eighth Circuit Court of Appeals, in a 2-1 decision, affirmed the district court. App. 1a-93a. The majority agreed that Canon 5's restrictions are narrowly tailored to serve the Minnesota Supreme Court's compelling state interest "to guarantee the independence of the Minnesota judiciary" from "'political, economic and social pressure.'" App. 21a-22a. Moreover, the appellate court accepted the district court's narrowing construction of the "announce clause" to forbid judicial candidates from announcing views on "disputed legal or political issues" only with regard to matters likely to come before the court. App. 43a-52a.

In dissent, Judge Arlen Beam argued at length that the State's compelling interest in judicial independence did not

justify Canon 5's prohibitions on a judicial candidate's campaign activity because these prohibitions directly contradict the plain language and legislative history of Minnesota's constitutional requirement that judges stand for popular election and, therefore, subject themselves to the rigors of public debate and public scrutiny. App. 60a-70a. He rejected the narrowing construction of the "announce" clause suggested by the district court and accepted by the Eighth Circuit majority on the grounds that it does not, in fact, effectively limit the prohibitive scope of the clause, so that the clause continues to "roam far beyond the the narrow category of speech left unprotected" by decisions of this Court. App76a-77a. Judge Beam also argued that the "attend and speak" clauses are grossly underinclusive in violation of First Amendment precedent and of equal protection of law in that they forbid attending and speaking at political party gatherings, such as gatherings of the Democratic or Republican Parties, but permit attending and speaking at all other organizational gatherings, such as organizational gatherings of the NRA or NAACP. App. 87a-91a. Finally, Judge Beam observed that the "endorsement" clauses severely "curtail[] a party's ability to endorse a candidate of its choosing" because "[p]arties are unlikely to endorse their preferred candidate so long as they fear handing an opponent a potential election issue – specifically, the specter of an ethics violation." App. 78a. "This in turn curtail voters' rights to hear parties' views as to candidates." *Id.*

REASONS FOR GRANTING THE PETITION

This case involves a matter of the greatest public importance – the right of the people of a state to select the members of their state court judiciary by popular election. Having conferred upon the state judiciary the power to make law through the development of the common law, the people of Minnesota have chosen, like most States, to select their judges

by popular election, thereby holding state court judges directly accountable to the people.

Because Minnesota's selection process for state court judges involves popular election, the First Amendment governs the conduct of judicial campaigns, protecting the freedom of speech and association necessary to ensure that the people have full access to the information they need to make an informed decision. Thus, this case also involves a matter of great constitutional importance, one, in fact, that goes to the very core of the First Amendment: the right of the people to associate with, to listen to, and to speak with candidates for elective judicial office and to participate in the electoral process by which state court judges are selected, as provided by the Minnesota Constitution.

In issuing the challenged provisions of Canon 5, however, the Supreme Court of Minnesota has acted to severely limit the information available to the voting public in judicial elections by prohibiting such candidates, their family, members of their campaign committees and their close associates from announcing the candidates' views on disputed legal or political issues, from attending or speaking at political party gatherings, and from seeking, accepting or using endorsements for political parties. Because the First Amendment "has its fullest and most urgent application" to campaigns for elective office, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), these provisions violate the First Amendment.

The decision of the court below also conflicts with the decision of this Court in *Eu v. San Francisco County Democratic Cen. Comm.*, 489 U.S. 214 (1989), which held that forbidding political parties from making pre-primary endorsements is unconstitutional. Moreover, the decision of the court below creates a conflict in the circuits, upholding a prohibition forbidding elective judicial candidates from announcing their views on disputed legal or political issues contrary to the

decision of the Seventh Circuit in *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993), and upholding severe burdens on political party endorsements of elective judicial candidates contrary to decision of the Ninth Circuit in *Renne v. Geary*, 911 F.2d 280 (9th Cir. 1990), *vacated on other grounds*, *Renne v. Geary*, 501 U.S. 312 (1991).

I. The Questions Presented Involve Important Matters.

The people of Minnesota have long insisted on a popularly elected state judiciary. Minnesota's Constitution, which requires an elected state judiciary, at article 6, § 7, was debated and adopted on the eve of the Civil War, when abolitionist sentiment was high and there was particular suspicion of the judiciary in light of the recent decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856). App. 64a-66a. Controversies among the Minnesota Constitution's framers were vehement, and the debate on whether judges should be appointed or elected mirrored the debate between Federalists and anti-Federalists that occurred during the framing of the U.S. Constitution. App. 63a, 66a-68a. However, in contrast to the decision for an appointed judiciary made by the framers of the federal constitution,

> Minnesotans of both parties opted for an elected judiciary. Ultimately, they more feared the potential politics of an appointed bench and saw popular election as the proper remedy. Given the political climate, they desired more control over their judiciary. *That was the policy adopted by the people of Minnesota.*

App. 67a (emphasis in original).

Minnesota has several times specifically rejected proposals to modify its Constitution in order to change the judicial selection process. App. 67a-70a. The people of Minnesota have

steadfastly insisted that all judges at all levels must be subject to popular election.

Furthermore, Minnesota courts, unlike the federal courts, exercise a law-making function through use of their common law powers. *See, e.g., Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1991) (recognizing claim for invasion of privacy); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (abolishing parental immunity); *Nieting v. Blondell*, 235 N.W.2d 597 (Minn. 1975) (abolishing state tort immunity). Thus, like elected legislators, it is entirely reasonable for the people to subject judges to popular election and scrutiny in a manner that would be less appropriate where courts have no such law-making power.

However, state court judges also have the responsibility "to apply the law neutrally," which the Court of Appeals found to be "a compelling governmental interest of the highest order." App. 21a. This interest is adequately served by the provision of Canon 5A(3)(d), which Petitioners do not challenge, that provides that candidates for elective judicial office shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." App. 133a.

The other provisions of Canon 5, however, prohibiting candidates[2] for elective judicial office from announcing their views on disputed legal or political issues, from seeking, accepting, or using the endorsements of political party organi-

[2]The challenged provisions actually sweep more widely to include more than just candidates, by including the candidate's family and associates. Canon 5A(3)(a) and (c) require candidates to "encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate" and provide that candidates may not "authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing." App. 133a.

zations,[3] and from attending or speaking at any political party gathering all directly affect speech and association "at the core of our electoral process and of the First Amendment freedoms," *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), and that are essential to campaigns for elective public office. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) ("[D]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution."). As a result, these provisions seriously undermine the integrity of the long-established selection process for state court judges adopted by the people of Minnesota.

There is no doubt that these challenged provisions would be deemed unconstitutional if applied to candidates for elective legislative or executive office. *See, e.g., Eu*, 489 U.S. 214; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Buckley*, 424 U.S. at 13-16. The Court of Appeals believed these provisions to be necessary here to maintain the independence of the judiciary. App. 21a-22a.

However, the very nature and purpose of the Minnesota elective judicial system belies the existence of a compelling state interest in an independent judiciary of the sort that would justify isolating judicial candidates from the electorate and depriving the electorate of the information necessary to cast an informed vote, as the challenged provisions of Canon 5 do. Whatever the nature of the state's interest in an independent judiciary might be, in the context of an elective judicial system, it cannot encompass an interest in banning political speech and association, which is at the heart of campaigns for elective political office. Thus,

> The State . . . cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full

[3]The judicial candidate's campaign committee is likewise forbidden to seek, accept, or use endorsements by Canon 5B(2). App. 135a.

> and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support or endorsements known. Nor can it complain if the citizens wish to make their electoral judgments based in part on recommendations made by political parties. If the people are to be given the right to choose their judges directly, they are free, rightly or wrongly, to consider the political philosophy of the candidates.

Renne, 911 F.2d at 294 (Reinhardt, J., concurring).

This case is, thus, about the integrity of the selection process the people of Minnesota have adopted for its judicial officials – popular election – since the integrity of popular elections depends on the right of voters to be informed about the positions of the candidates and, correspondingly, the right of candidates to let their positions be known. The challenged provisions of Canon 5 are not necessary to maintaining judicial neutrality in decisionmaking, but striking them is necessary to maintaining the integrity of the popular election process.

Nor is this a case about the "dangers" posed by "partisan elections," as also suggested by the Court of Appeals. App. 32a. While Minnesota judicial elections are "nonpartisan," "nonpartisan" elections under Minnesota statutes have only two meanings – party designation does not appear next to the candidate's name on the ballot and the candidates are selected for a general runoff from a single primary without regard to party identification. Minn. Stat. §§ 204B.36, 204D.05, 204D.10(3), 204D.14. This case, however, is not about how candidates are identified on the ballot and how they are selected to run. It is rather about *campaigns* for public office, since the challenged provisions restrict information about candidates for elective office, those associated with them, and those who might support or oppose them during the election.

That the Court of Appeals decision upheld these provisions, which so seriously undermine the values at the heart of the First Amendment, in itself presents an issue of sufficient importance to warrant review by this Court. However, the questions presented by this case are also of national import. Thirty-four states mandate popular election of their judiciaries,[4] and only sixteen states exclusively appoint them.[5] Further, as the Court of Appeals noted, the Minnesota Code of Judicial Conduct is "based in large measure on the ABA's Model Canons of Judicial Conduct (1972)." App. 8a. Thus, whether and the extent to which the rights of judicial candidates may be denied or burdened by restrictions on their political speech and association in the context of a popular election is a matter of nationwide interest and importance. This Court should provide

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[4]Twenty-five states require entirely elective judicial systems. Ark. Const. art. 7, §§ 6, 17; Cal. Const. art. VI, § 16; Fla. Const. art. V, § 10; Ga. Const. art. VI, § VII, para. I; Idaho Const. art. VI, § 7; Ill. Const. art. VI, § 12; Kan. Const. art. 3, § 6; Ky. Const. § 117; La. Const. art. V, § 22; Mich. Const. art. VI, §§ 2, 8, 12; Miss. Const. art. 6, § 145; Mont. Const. art. VII, § 8; Nev. Const. art. 6, §§ 3, 5; N.M. Const. art. VI, § 33; N.C. Const. art. IV, §§ 9-10, 16; N.D. Const. art. 6, §§ 7, 9; Ohio Const. art. IV, § 6; Okla. Const. art. VII, § 3; Or. Const. art. VII, § 1; Pa. Const. art. 5, § 13; Tenn. Const. art. VI, §§ 3-4; Tex. Const. art. V, §§ 2, 7; Wash. Const. art. IV, §§ 3, 5; W. Va. Const. art. VIII, §§ 2, 5; Wis. Const. art. VII, § 9.

[5]Alaska Stat. §§ 22.10.100, 22.15.170, 22.05.080 (Michie 2001); Ariz. Const. art. 6, §§ 37, 40, 42; Colo. Const. art. VI, § 20; Del. Const. art. IV, § 31; Haw. Const. art. VI, § 3; Iowa Const. art. V, § 17; Md. Const. art. IV, § 3; Mass. Const. ch. III, art. I; Neb. Const. art. 5, § 21; N.H. Const. pt. 2, art. 46; N.J. Const. art 6, § VI, para. 1; R.I. Const. art. X, § 4; S.C. Const. art. V, §§ 3, 8, 13, 18; Utah Const. art. VIII, § 8; Va. Const. art. VI, § 7; Wyo. Const. art. 5, § 4.

Nine states select their judiciaries in hybrid manners, utilizing both elective and appointive methods. Ala. Const. art. VI, §§ 152-153; Conn. Const. art. V, § 2; Ind. Const. art. 7, §§ 7, 10-11; Me. Const. art. 6, § 6 & art. 5, pt. 1, § 8; Minn. Const. art. 6, § 7 & Minn. Stat. § 480B.01 (2001); Mo. Const. art. 5, § 25; N.Y. Const. art. VI, §§ 2, 6, 9; S.D. Const. art. V, § 7; Vt. Const. §§ 32, 50-51.

guidance on the nature and scope of the rights and interests at stake of those involved in popular elections for judicial office.

II. The Court of Appeals' Decision Upholding the Ban on Candidates for Elective Judicial Office from Announcing Their Views on Disputed Legal or Political Issues Conflicts with the Decisions of the Seventh Circuit.

Canon 5A(3)(d)(i) provides, in relevant part, that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." App. 133a-134a. The district court upheld the constitutionality of the "announce" clause, after construing it "as only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court." App. 129a. The Eighth Circuit upheld the provision as "prohibiting candidates only from publicly making known how they would decide issues likely to come before them as judges." App. 53a.

In contrast, the Seventh Circuit struck down an identical Illinois rule forbidding a candidate for judicial office from "announc[ing] his views on disputed legal or political issues." *Buckley v. Illinois*, 997 F.2d 224, 225 (7th Cir. 1993) (quoting Ill. S. Ct. R. 67(B)(1)(c), Ill. Rev Stat. ch. 110A P 67(B)(1)(c)). The Seventh Circuit observed, through Chief Judge Posner, that the plain language of the "announce" clause,

> is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not "announce his views on disputed legal or political issues," period. The rule certainly deals effectively with the abuse that the draftsmen were concerned with; but in so doing it gags the judicial candidate. He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. . . . The rule thus reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in an election. Indeed, the only safe response to [the "announce" clause] is silence.

997 F.2d at 228.

The Seventh Circuit specifically rejected a narrowing interpretation of the clause, substantially identical to the narrowing interpretation adopted here, that the prohibition was "confined to issues likely to come before the judge in his judicial capacity." *Id.* at 229. Although the Seventh Circuit believed such a construction both plausible and consistent with the policy of the Illinois Supreme Court in interpreting its statutes, where possible, to sustain their constitutionality, the Seventh Circuit held that "the district judge's interpretation does not in fact circumscribe [the "announce" clause] significantly." *Id.* This is so because "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Id.* To construe the language of the "announce" clause to only prohibit a discussion of political or legal issues likely to come before a state court simply does not solve the constitutional problem.

Moreover, the "announce" clause is not "readily susceptible" to the saving construction that the Eighth Circuit tried to provide it. *See Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965). The plain language of the clause provides no expressed or implied limitation to its ban on announcing positions on "disputed legal or political issues" – the clause does not confine its prohibition to matters in litigation, much less to matters in litigation likely to come before the candidate if elected as a judge. As the Seventh Circuit held, "[i]t is not our proper

business to patch up the rule – and it would be a patchwork job. Indeed, with the rule itself saying one thing and the judicial gloss on it another." *Buckley*, 997 F.2d at 230.

Several other courts agree with the Seventh Circuit in *Buckley*, striking down judicial canons similar to Minnesota's Canon 5 "announce" clause. *Beshear v. Butt*, 863 F. Supp. 913, 917-918 (E.D. Ark. 1994); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-957 (Ky. 1990). *See also Pittman v. Cole*, 117 F. Supp. 1285 (S.D. Ala. 2000) (ban on answering questions relating to political and legal issues unconstitutional). However, the Third Circuit upheld an "announce" clause after construing it in a manner similar to the Eighth Circuit. *Stretton v. Disciplinary Bd.*, 944 F.3d 137 (3rd Cir. 1991).

In view of the conflict among the circuits and other courts, the question of whether the provision forbidding judicial candidates from announcing their views on disputed legal or political matters passes constitutional muster should properly be reviewed by this Court.

Furthermore, the conflict that exists is not simply whether or to what degree such "announce" clauses might be construed in order to avoid constitutional infirmity. As the Seventh Circuit made clear, any "saving" construction presents problems of its own, not only by casting the federal courts in the role of a "Council of Revision," *Buckley*, 997 F.2d at 230, but also because proposed interpretations – such as limiting bans on announcing positions on disputed legal or political issues to those "likely to come before the courts" – do not cure the constitutional defect. Review by this Court is thus appropriate in order to define the nature and scope of the constitutional values that limit the degree to which political speech by judicial candidates might impinged.

III. Canon 5's Severe Burdens on Political Party Endorsements Constitute an Unconstitutional Infringement on the Right of Political Parties to Endorse Candidates for Elective Public Office.

Canon 5A(1)(d) provides in relevant part that any candidate for elective judicial office "shall not . . . seek, accept or use endorsements from a political organization," App. 134a, nor, pursuant to Canon 5B(2), may the candidate's campaign committee. App. 135a. Canon 5D provides that "[f]or the purposes of Canon 5 the term political organization denotes a political party organization." App. 135a. Thus, Canon 5 forbids a candidate for judicial office and his or her campaign committee from seeking, accepting, or using an endorsement of a political party – such as the Democratic or Republican Party – but does not forbid a candidate from seeking, accepting, or using the endorsement of any other political organization or person.

Furthermore, Canon 5A(1)(d) also provides that judges and judicial candidates may not attend political gatherings, App. 132a, and Canon 5B(1)(a) prohibits them from speaking to political party organizations on their behalf. App. 134a. Thus, judicial candidates are forbidden to attend any political gatherings, including political party gatherings, even if attendance has nothing to do with candidacy, but is, for instance, to assist in developing party policy on unrelated matters or merely to listen to debate on various issues. Furthermore, judicial candidates are specifically prohibited from speaking to political party gatherings on *any* topic, whether related to the candidate's election or not and even on matters the Canons would otherwise allow.

Similarly, because of Canon 5A(3)(a) and (c), the candidates' family, members of their campaign committee and their close associates are forbidden from seeking, accepting or using any political party endorsements and from attending or speaking at political party gatherings.

While short of the outright ban on political party endorsements struck down by this Court in *Eu*, these provisions

individually and collectively impose a severe burden on political party endorsements and, therefore, are in conflict with *Eu*.

In *Eu*, this Court held that a California ban on primary endorsements by political parties burdened the rights to free speech and freedom of association, 489 U.S. at 225, because it "directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates on campaign issues." *Id.* at 223 (citations omitted). Furthermore, because the state interests offered in support of the primary endorsement ban – interests in "stable government" and in "protecting voters from confusion and undue influence," *id.* at 225 – were not advanced by the ban, *id.* at 226-229, this Court held the ban violated the First and Fourteenth Amendments. *Id.* at 229.

In the present case, the burdens placed on political party endorsements effectively prevent political parties from exercising their First Amendment right to endorse candidates for elective judicial office by depriving political parties of the information they need from the most relevant and credible source – from the candidates themselves. The Canons go even further by also prohibiting the candidate's family and associates from providing the information sought by the political party. Furthermore, the value of the endorsement is seriously undermined by prohibiting the candidate from communicating it to the voters, which "directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates on campaign issues." *Eu*, 498 U.S. at 223 (citations omitted).

Nor are these severe burdens on political party endorsements justified because this is an election for judicial office. First, as in *Eu*, "[a] State may enact laws to 'prevent the disruption of the political parties from without,' but not, as in this case, laws 'to prevent the parties from taking internal steps affecting their own process of the selection of candidates.'" *Id.* at 227 (quoting *Tashjian*, 479 U.S. at 224). The Court of Appeals sought to distinguish this Court's decision in *Eu* by

suggesting the presence of evidence of a "threat to the integrity or reputation of the judiciary from involvement in partisan politics," which this Court did not find in *Eu*. App. 33a. However, the Ninth Circuit in *Eu* found that "the government has no legitimate interest in protecting parties from the disruption that the State argues will result if parties are free to make preprimary endorsements." *San Francisco Democratic Central. Comm. v. Eu*, 826 F.2d 814, 835 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989).

Second, limiting the severe burdens on endorsements only to political party organizations[6] cannot survive constitutional scrutiny, since it is not "narrowly tailored." *Tashjian*, 479 U.S. at 217. Far from being "narrowly tailored," Canon 5's burdens on endorsements are at best arbitrary. As Judge Beam in dissent points out,

> Candidates remain free to consort with organizations such as the National Organization of Women, the NAACP, the Christian Coalition, the National Association of Manufacturers, the AFL-CIO or the NRA.... Candidates remain free to seek and use the endorsements of the insurance lobby, the Minnesota Trial Lawyers Association or any other political or quasi-political association not organized as a "political party."

App. 88a-89a.

Thus, the burdens on political party endorsements are "underinclusive," singling out only political parties as the enemies of judicial neutrality when many other political organizations are equal or greater threats. If the harm threatened by organizational endorsements is potential loss of judicial impartiality, then Canon 5's ban cannot be said to be narrowly tailored to avoid this harm. Thus, Canon 5 runs afoul of

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[6]While judicial candidates are banned from "attending" any political gathering, the prohibitions on "speaking" and "seeking, accepting, or using" endorsements applies only to political party organizations.

precedents of this Court holding that to single out for punitive measures certain types of speech from certain speakers violates the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Carey v. Brown*, 477 U.S. 455 (1980).

The Court of Appeals sought to avoid this result by claiming that "when underinclusiveness results from a choice to address a greater threat before a lesser, it does not run afoul of the First Amendment." App. 35a-36a (citing *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 470-71 (8th Cir. 1991), and *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 146 (3d. Cir. 1991)). But the "time, place, and manner" restrictions at issue in, for example, *Cornerstone Bible Church* and other similar cases are very different than the unconstitutional burden on political speech and association at issue here. The instant case is instead closely analogous to that of *Carey v. Brown*, where this Court held that a ban on residential picketing other than labor picketing violated the First Amendment. 447 U.S. at 464. If a ban on residential picketing, except labor picketing, is unconstitutionally underinclusive, then so is the endorsement provision here, which permits judicial candidates to be endorsed for elective office by any organization, except a political party organization.

Moreover, it is simply not the case that "the State has shown that a candidate's use of political parties in judicial campaigns poses a greater threat to the compelling state interests than involvement of other kinds of groups." App. 36a. The factors cited by the Court of Appeals at most support the general proposition that partisan activities which may attend judicial elections may cause certain difficulties and raise certain concerns that have been willingly assumed by the people of Minnesota as a necessary incidence to their choice of popular election for the selection method of state court judges.

But there is no substantial evidence that the endorsements of political *parties* are any more threatening to judicial independence, impartiality, or neutrality than permitting endorsements by *other* political organizations or personalities.

To the contrary, political parties tend to have broader interests that would mitigate any particular influence on a judge that their endorsements might otherwise have. Other interest groups, which can continue freely to endorse judicial candidates under Canon 5, generally have narrower agendas that sharply focus on the achievement of particular results in particular cases before the judge. As Judge Beam notes in dissent, "Given their focus and intensity, such groups are much more capable [than political parties] of bringing their members' wrath to bear on elected officials including judges who stray from their point of view."[7] App. 89a-90a.

Likewise, Canon 5's burdens on political party endorsements are unconstitutional under equal protection jurisprudence. There is no rational, much less compelling, justification for the classification drawn by Canon 5 between political party associations and other political organizations (such as single issue advocacy groups or political action committees), severely burdening endorsements by political parties while permitting them for all other organizations.

If political parties warrant some special status, it is precisely because they traditionally amplify the discussion and debate of ideas so essential to the elective political process. But whether or not political parties deserve some status in our legal order warranting special deference to their prerogatives, they surely do not deserve to be treated as organizational pariahs and unique threats to the electoral process. There is no justification to muzzle political party organizations during election contests while all other organizations and personalities are allowed to speak freely.

In sum, the Eighth Circuit's decision in this case, upholding severe burdens on political party endorsements of candi-

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[7]One needs only to consider that the Canons allow judicial candidates to "attend," to "speak" to, and to "seek" the endorsement of the Minnesota Trial Lawyers Association, but not the Republican Party, to understand the "underinclusiveness" of the Canon's prohibitions.

dates for elective office, is erroneous under the decision of this Court in *Eu*. This Court should grant review to correct this error.

IV. Furthermore, The Court of Appeal's Decision Upholding Canon 5's Severe Burdens on Political Party Endorsements of Candidates for Elective Judicial Office Is in Conflict with the Ninth Circuit.

In *Renne v. Geary*, 911 F.2d 280 (9th Cir. 1990) (en banc), the Ninth Circuit held unconstitutional a California state constitutional amendment prohibiting political parties from endorsing candidates to elective nonpartisan offices – all candidates for city, county, school, and judicial offices. *See id.* at 282. The *Renne* court held that "[e]ven if we were to find that state interests underlying [the California amendment] compelling, we still would be bound to declare the amendment invalid, because appellants have failed to show that [the amendment] is narrowly tailored to achieve its purported objectives." *Id.* at 284-285 (citations omitted).

The Ninth Circuit decision in *Renne* was vacated on jurisdictional grounds by this Court because plaintiffs in the case had failed to "allege an intention to endorse any particular candidate" in violation of the amendment. *Renne v. Geary*, 501 U.S. 312, 321 (1991). Subsequent to the decision of this Court, however, the challenge to the California amendment was promptly renewed in *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996). Following the Ninth Circuit's decision in *Renne*, the *Lungren* court held the California amendment unconstitutional. *Id.* at 1405. Specifically addressing the claim that the amendment should be upheld as applied to judicial candidates, the court noted its sympathy to the desire to protect judges from political pressures, but,

> Nonetheless, [the amendment] is no more constitutional as applied to judicial campaigns than it is as applied to other campaigns for nonpartisan office. . . . California cannot suppress speech by political parties

> concerning the merits of judicial candidates' qualifications for office.

Id. (citations omitted). *See also Democrats v. Reno*, 458 F. Supp. 60, 65 (N.D. Fla. 1996) (ban on endorsement of judicial candidates unconstitutional).

There is a clear conflict between the Eighth and Ninth Circuits on this matter. This Court should accept review in order to resolve it.

V. The Court of Appeals' Decision Upholding Canon 5's Ban on Judicial Candidates Attending or Speaking at Political Party Gatherings is Erroneous.

As noted, Canon 5A(1)(d) provides that judges and judicial candidates may not attend any political gatherings, including those of political parties, App. 132a, and Canon 5B(1)(a) provides that they may not speak at all to political party organizations. App. 134a. Pursuant to Canon 5A(3)(a) and (c), each of these prohibitions also apply to the candidates' family, members of their campaign committee, and their close associates. App. 133a.

Petitioners could not identify any similarly broad ban on judicial candidates' speech or association in any other state. Indeed, the American Bar Association's model canons have consistently and specifically permitted judicial candidates to attend and speak at any political gathering. *See* 1972 Model Code of Judicial Ethics, Canon 7A(2) (judge holding elective office or judicial candidate "may . . . attend political gatherings [and] speak to such gatherings on his own behalf"); 1990 Model Code of Judicial Conduct, Canon 5C(1)(a)(i)-(ii) and (b)(i) (a judge or candidate for elective office subject to public election may "attend and speak to gatherings on his or her own behalf . . . or identify himself or herself as a member of a political party").

Because Canon 5's ban on speaking at political party gatherings is even more oppressive than the ban on speech that

is imposed by the Canon's "announce" clause, it is even more plainly in violation of the First Amendment. Even if the First Amendment would tolerate a ban on judicial candidates announcing positions on disputed legal and political issues, a ban on any speech by a judicial candidate, and others closely associated with him, to a political party gathering, even on matters otherwise allowed under the "announce" clause, cannot be sustained.

Moreover, Canon 5's ban on attending any political gatherings also violates a candidate's and a political party's right to free association. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), which includes association with partisan political organization. *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (plurality opinion); *Buckley*, 424 U.S. at 15 ("The right to associate with the political party of one's choice is an integral part of this freedom."). If this is so, then depriving candidates of the right to even attend gatherings of a political party plainly deprives both the party and candidate of constitutionally guaranteed freedom of association.

Even if these burdens on freedom of speech and association were justified, they are not narrowly drawn. The ban on all speaking at and attendance by judicial candidates at political party gatherings is grossly overinclusive, denying both the candidates and parties speech and associational rights as to matters and issues completely unrelated to the judicial candidacy. Furthermore, as explained above, the ban is underinclusive by permitting judicial candidates to speak at gatherings of other organizations, including organizations that might more easily compromise their judicial neutrality.

Moreover, denying candidates the right to attend or speak at political party gatherings, but allowing them to attend or speak at other gatherings, denies both the candidates and parties equal protection of law in violation of the Fourteenth

Amendment. As explained above, there is no constitutional justification to forbid candidates to attend and speak at political party gatherings, but allow them to speak at others.

Thus, the Court of Appeals erred under precedents of this Court in upholding Canon 5's bans on candidate speech and attendance at political party gatherings. Review by this Court is appropriate to reverse its error.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-4021

Republican Party of Minnesota, an association; Indian Asian American Republicans of Minnesota, an association; Republican Seniors, an association; Young Republican League of Minnesota, a Minnesota nonprofit corporation; Minnesota College Republicans, an association,	*	
Plaintiffs- Appellants,	*	Appeal from the United States District Court for the District of Minnesota
Gregory F. Wersal, individually,	*	
Plaintiff,	*	
Cheryl L. Wersal, individually; Mark E. Wersal, individually; Corwin C. Hulbert, individually,	*	
Plaintiffs - Appellants,	*	
Campaign For Justice, an association,	*	
Plaintiff,	*	

Minnesota African American Republic Council, an association,
Plaintiff - Appellant,

Muslim Republicans, an association; Michael Maxim, individually; Kevin J. Kolosky, individually,
Plaintiffs,
v.

Verna Kelly, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor,
Defendant,

Barry M. Lazarus, in his capacity as Chairperson of the Minnesota Board of Judicial Standards, or his successor; Edward J. Cleary, in his capacity as director of the Minnesota Office of Lawyers Professional Responsibility, or his successor; Charles E. Lundberg, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor,
Defendants - Appellees,

Minnesota Civil Liberties Union,

Amicus on Behalf of Appellants,

The Minnesota State Bar Association,
Amicus on Behalf of Appellee.

No. 99-4025

Republican Party of Minnesota, an association, Indian Asian American Republicans of Minnesota, as association; Republican Seniors, an association; Young Republican League of Minnesota, a Minnesota nonprofit corporation; Minnesota College Republicans, an association; Minnesota African American Republic Council, an association; Cheryl L. Wersal, individually; Mark E. Wersal, individually; Corwin C. Hulbert, individually; Gregory F. Wersal, individually; Campaign for Justice, an association; Muslim Republicans, an association,
Plaintiffs,

Michael Maxim, individually,

Plaintiff - Appellant,

Kevin J. Kolosky, individually,
Plaintiff,

v.

Verna Kelly, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor;
Defendant,

Barry M. Lazarus, in his capacity as Chairperson of the Minnesota Board of Judicial Standards, or his successor; Edward J. Clearly, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor; Charles E. Lundberg, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor,
Defendants - Appellees,

The Minnesota State Bar Association,
Amicus on Behalf of Appellee.

No. 99-4029

Republican Party of Minnesota, an association; Indian Asian American Republicans of Minnesota, an association; Republican Seniors, an association, Young Republican League of Minnesota, a Minnesota non profit corporation; Minnesota College Republicans, an association,
Plaintiffs,

Gregory F. Wersal, individually;
Plaintiff - Appellant,

Cheryl L. Wersal, individually; Mark E. Wersal, individually; Corwin C. Hulbert, individually;
Plaintiffs,

Campaign for Justice, an association;
Plaintiff - Appellant,

Minnesota African American Republic Council, an association; Muslim Republicans,

an association; Michael Maxim, individually;
Plaintiffs,

Kevin J. Kolosky, individually,
Plaintiff - Appellant,
v.

Verna Kelly, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor;
Defendant,

Barry M. Lazarus, in his capacity as Chairperson of the Minnesota Board of Judicial Standards, or his successor; Edward J Cleary, in his capacity as director of the Minnesota Office of Lawyers Professional Responsibility, or his successor; Charles E. Lundberg, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor,
Defendants - Appellees,

The Minnesota State Bar Association,
Amicus on Behalf of Appellants.

Submitted: May 10, 2000
Filed: April 30, 2001

Before McMILLIAN, JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The issue before us in this appeal is whether Canon 5 of the Minnesota Code of Judicial Conduct, a rule promulgated by the Supreme Court of Minnesota to deal with political activity deemed inappropriate to judicial office, violates the First and Fourteenth Amendments of the United States Constitution. Canon 5 restricts candidates for judicial office from attending and speaking at partisan political gatherings; identifying their membership in a political party; seeking, accepting, or using a political party endorsement; announcing their views on disputed legal and political issues; personally soliciting campaign contributions; or authorizing or knowingly permitting others to do these things on the candidates' behalf. The district court[1] held that Canon 5's provisions, except for the restriction on candidates announcing their views on disputed legal and political issues, were narrowly tailored to serve a compelling state interest in maintaining the independence and impartiality of Minnesota's judiciary, did not offend equal protection, and were not impermissibly vague. *Republican Party v. Kelly*, 63 F. Supp. 2d 967, 974-83 (D. Minn. 1999). As to the "announce" clause, the court concluded that a broad reading of the clause

[1]The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

would raise constitutional difficulties. The court construed the clause narrowly to uphold its constitutionality, however, predicting that the Minnesota Supreme Court would do the same. *Id.* at 983-86. We affirm.

I.

The Minnesota Constitution provides that judges "shall be elected by the voters from the area which they are to serve," and that their term of office shall be six years. Minn. Const. art. 6, § 7. In 1912, the Minnesota General Assembly designated judicial elections as nonpartisan, meaning that party affiliation is not listed when candidates file for office, nor does it appear on the ballot. Act of June 19, 1912, ch. 2, 1912 Minn. Laws Spec. Sess. 4-6.

Ethical codes restricting the campaign conduct of judicial candidates have existed in Minnesota since at least 1950, when the Minnesota District Judges Association adopted by unanimous vote the ABA's Canons of Judicial Ethics (1924). In 1974, the Minnesota Supreme Court promulgated a code of judicial conduct that was based in large measure on the ABA's Model Code of Judicial Conduct (1972). Over the years, the Minnesota Supreme Court has revised its ethical rules, including those relating to a candidate's ability to attend and speak at political gatherings, to solicit campaign funds, and to discuss certain topics.

Gregory Wersal, a Minneapolis-area attorney and longtime member of the Republican Party of Minnesota, ran unsuccessfully for the office of Associate Justice of the Minnesota Supreme Court in 1996 and 1998. The year Wersal launched his first campaign, the Minnesota Supreme [*858] Court revised its code of judicial conduct. The court renumbered and reorganized the canons and made several substantive changes, bringing the code largely in line with the 1990 version of the ABA's Model Code of Judicial Conduct.

Wersal interpreted one revision to lift a twenty-two-year ban on judicial candidates speaking to partisan political gatherings. From 1974 until 1996, Canon 7 of the Minnesota Code of Judicial Conduct barred candidates and judicial incumbents from speaking at partisan political gatherings, but allowed them to accept invitations to speak on their own behalf to other groups. Canon 7(A)(2) (1974) (a judicial candidate or incumbent "may accept invitations to attend and speak on his own behalf at other than partisan political gatherings"). It also prohibited judges from engaging in political activity except on behalf of measures to improve the law or the legal system. Canon 7(A)(4) (1974). In the 1996 revisions, the Minnesota Supreme Court reorganized and revised the subsections of Canon 7 and renumbered it as Canon 5. One subsection of the newly revised Canon 5 allowed candidates and judges to speak on their own behalf to gatherings generally, while another prohibited candidates and incumbents from attending political events. Canon (5)(A)(1)(a) & (d) (1996).

Consistent with his reading of the canon, Wersal, his wife Cheryl, and members of his campaign committee spoke at Republican Party gatherings as part of Wersal's 1996 bid for office. At these gatherings, they announced that Wersal was a member of the Republican Party and that he favored strict construction of the Constitution. They distributed campaign literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion as being "marked by their disregard for the Legislature and lack of common sense." In addition, the campaign committee sought unsuccessfully to obtain an endorsement by the Republican Party.[2]

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[2]At least in recent times, it has not been the norm in Minnesota for judicial candidates to seek political party endorsements or for political parties

(continued...)

In May 1996, a delegate to a Republican district convention filed an ethical complaint against Wersal with the Office of Lawyers Professional Responsibility. The Office of Lawyers Professional Responsibility, under the direction of the Minnesota Lawyers Professional Responsibility Board (collectively, the Lawyers Board), investigates and prosecutes ethical violations of lawyer candidates for judicial office. The complainant questioned the propriety of Wersal's attendance at Republican gatherings, the campaign committee's solicitation of partisan support, and the campaign materials critical of Minnesota Supreme Court decisions. The Director of the Lawyers Board dismissed the complaint, concluding that no disciplinary action was warranted under Canon 5.

In the Director's written determination, she first noted that it was unclear whether the Minnesota Supreme Court had intended to retain the ban on candidates speaking [*859] to political gatherings when it revised the code in 1996. Second, she pointed out that the 1996 version of Canon 5 restricted only candidates, and not their campaign committees, from soliciting publicly stated support. Finally, the Director expressed doubts about the applicability of the announce clause to Wersal's campaign statements. Citing several decisions from other jurisdictions in which similar language was either struck down

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[2](...continued)
to consider endorsing them. The parties submitted no evidence that other judicial candidate campaign committees sought or were considered for such endorsements. In a February 10, 1998 letter, Wersal wrote a newspaper editor that "the Republican Party had never endorsed a judicial candidate before," and a June 20, 1998 Minnesota newspaper article characterized the Party's deliberation over whether to endorse Wersal as "a historic break with tradition." Party endorsements may not have been uncommon early in the twentieth century. See *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579, 581-82 (Minn. 1939) (Loring, J., concurring) (commenting on recent allegations of party treason directed at judges who issued decisions contrary to endorsing party's interests).

or interpreted narrowly, she also questioned whether the clause was enforceable.

Ethical complaints are deemed confidential in Minnesota, but notification of the Director's initial determination whether a complaint should be dismissed summarily or investigated further is provided to the complainant and to the respondent lawyer. Sometime after Wersal received this notification, he withdrew his candidacy for the 1996 race, fearing that further ethical complaints would jeopardize his ability to practice law. In January of the following year, Wersal announced his candidacy for a supreme court seat opening up in 1998, and he and his campaign committee began campaigning as they had in the 1996 race, including the campaign committee's pursuing the Republican Party endorsement.

The Minnesota Board on Judicial Standards (the Judicial Board), the body charged with enforcing ethical codes against judges, petitioned the Minnesota Supreme Court in September 1997 to amend Canon 5, primarily to clarify the nonpartisan nature of judicial elections. The Judicial Board, which had become aware that Wersal's campaign committee was soliciting a political party endorsement, urged the court to add language that would limit the ability of candidates to identify themselves as members of a political organization and that would prevent campaign committees from seeking endorsements from political organizations. The Judicial Board also recommended that the court clarify that judicial candidates could not speak to political gatherings. Following a hearing, the court adopted each of these recommendations. Order Amending Canon 5 of the Code of Judicial Conduct, No. C7-81-300 (Dec. 23, 1997). The changes took effect January 1, 1998.

In February 1998, Wersal sought an advisory opinion from the Lawyers Board. He asked whether the Board would prosecute him for ethical violations if he spoke at political party

gatherings or sought a Republican Party endorsement. He also inquired whether the Board would enforce the provision of Canon 5 restricting candidates from announcing their views on disputed issues. The Director answered by stating that Wersal would be subject to discipline regarding the first two actions he proposed, but that the Board could not advise him on the latter question since Wersal had not provided the Board with information about any particular statements he wished to make that might have been a view on a disputed legal or political issue. The Director also stated that the Board continued to have "significant doubts as to whether or not [the announce clause] would survive a facial challenge to its constitutionality" and that it would not enforce the provision unless the speech at issue violated other portions of the judicial ethics code.

A few days after he received this advisory opinion, Wersal filed this complaint under 42 U.S.C. § 1983 (1994), seeking declaratory and injunctive relief from the provisions of Canon 5. Joined as plaintiffs were the Republican Party of Minnesota (the Party), its affiliated organizations,[3] [*860] and several other individuals and organizations interested in Wersal's candidacy.[4]

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[3]These affiliated organizations included the Indian Asian American Republicans, the Republican Seniors, the Young Republicans League of Minnesota, and the Minnesota College Republicans. The Minnesota African American Republican Council and the Muslim Republicans, also affiliated organizations, were later added as plaintiffs.

[4]Other plaintiffs included Wersal's campaign committee, and Party members Cheryl Wersal, Mark Wersal, and Corwin Hulbert. Michael Maxim, another member of the Minnesota Republican Party, and Kevin Kolosky, also a candidate for judicial office in 1996 and 1998, later joined as plaintiffs. Because the Party, its affiliated organizations, and its members Cheryl Wersal, Mark Wersal, and Corwin Hulbert have filed a single brief, we refer only to the Party when addressing their arguments. Likewise, we refer only to Gregory Wersal when addressing his contentions, those of Kolosky, and

(continued...)

The complaint alleged that Canon 5 violated the free speech and association guarantees of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Wersal and the other plaintiffs moved for a temporary restraining order and/or preliminary injunction to enjoin the Lawyers Board and Judicial Board from enforcing Canon 5 so that Wersal would be free to participate in Republican precinct caucuses scheduled for early March 1998. The district court denied the motion,[5] and we subsequently affirmed. *Republican Party v. Kelly*, 996 F. Supp. 875 (D. Minn. 1998), aff'd, No. 98-1625 (8th Cir. Nov. 2, 1998).

While appeal of the district court's order was pending, Wersal continued his campaign, but was forced to cancel the numerous speaking engagements he had scheduled at the precinct caucuses and other Republican events. He wrote at least five persons who he knew intended to advocate his candidacy at these events and asked them not to do so because of his concern that someone might infer that he had "knowingly permitted" them to do so in violation of Canon 5. On advice of counsel, he declined to answer questions posed by members of the press and public when he thought answering might impermissibly disclose his views on disputed issues. His wife Cheryl and his brother Mark, a member of his campaign committee, refrained from taking part in certain campaign activities on Wersal's behalf for fear that their action would subject Wersal to discipline.

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[4](...continued)
the campaign committee, who also have submitted a single brief.

[5]The district court found that the plaintiffs established a likelihood of success on their claim that the announce clause was unconstitutional, but concluded that the State's interest in maintaining a nonpartisan judicial election weighed against enjoining enforcement of all of Canon 5. *Republican Party v. Kelly*, 996 F. Supp. 875, 879-80 (D. Minn. 1998).

At the state Republican convention held in June, Michael Maxim, a delegate who was later joined as a plaintiff in this case, moved that the Party endorse Wersal. After considerable debate, the motion failed by a vote of 344 to 390. No other candidates for judicial office were nominated for endorsement. Because of the Republican Party's policy of not supporting candidates it had not formally endorsed, the Party did nothing to further Wersal's bid for office. His campaign ended when he came in third in the primary.

The parties filed cross motions for summary judgment. The district court found in favor of defendants on all claims. *Republican Party v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999). The court concluded that the State had compelling interests in maintaining the actual and apparent integrity and independence of the judiciary and that the restrictions on candidates' political activity and fund solicitation were narrowly tailored to serve those interests. *Id.* at 974-80. It also upheld the provisions against vagueness and equal protection [*861] challenges. *Id.* at 980-82. In its analysis of the announce clause, the court determined that the critical issue was whether the provision was narrowly tailored to serve the State's interest in maintaining the integrity and independence of the judiciary. The district court construed the clause to reach only the discussion of issues likely to come before the court, having considered that the Judicial Board had argued for a narrow interpretation of the clause and that the Minnesota Supreme Court, when possible, construes laws to prohibit their application to constitutionally protected expression. *Id.* at 985-86. The court then concluded that the provision did not offend the First Amendment. *Id.* at 986.

Wersal and those joined with him appeal,[6] challenging the determinations made by the district court.

II.

We review the district court's grant of summary judgment de novo, applying the same standard the district court applied to the motion. *Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 729 (8th Cir. 1995). We will affirm if we conclude there are no genuine issues of material fact and the Lawyers and Judicial Boards are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

The plaintiffs contend that Canon 5 contravenes their First Amendment rights to freedom of speech and of association, made applicable to the States by the Due Process Clause of the

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[6]For the first time on appeal, the Lawyers and Judicial Boards contend that the plaintiffs who are not candidates for judicial office and cannot be sanctioned by the Boards lack standing to challenge Canon 5. Citing *Laird v. Tatum*, 408 U.S. 1, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972), the Boards argue that the plaintiffs' voluntary decisions not to advocate Wersal's candidacy do not constitute legally cognizable injuries. However, the plaintiffs have alleged more than the subjective "chilling" of their free speech rights held insufficient by the Supreme Court in *Tatum*, 408 U.S. at 13-14. Wersal and the other plaintiffs have stated they were unable to associate with each other at political party gatherings and alleged they would have done so absent the ethical restrictions. Deprivation of the right to associate with others politically is a cognizable "injury in fact." *See Lerman v. Board of Elections*, 232 F.3d 135, 143 (2d Cir. 2000), *petition for cert. filed* (U. S. Feb. 28, 2001) (No. 00-1360); *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000), *cert. denied*, 148 L. Ed. 2d 960, 121 S. Ct. 1085 (2001) (No. 00-923). Because the plaintiffs' associational injuries are fairly traceable to Canon 5 and the injunctive relief they request will redress them, the plaintiffs have standing to assert their claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (Article III standing requires plaintiffs allege "injury in fact" fairly traceable to defendant's conduct likely to be redressed by favorable court decision); *National Solid Waste Management Ass'n v. Williams*, 146 F.3d 595, 598 (8th Cir. 1998).

Fourteenth Amendment. *Tashjian v. Republican Party*, 479 U.S. 208, 214, 93 L. Ed. 2d 514, 107 S. Ct. 544 (1986).

Freedom of speech reaches its high-water mark in the context of political expression. Debate about the qualification of candidates for public office is at the core of our First Amendment freedoms, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989), valuable not only as a personal liberty, but also because of the role it plays in the proper functioning of our entire democratic form of government. *Burson v. Freeman*, 504 U.S. 191, 196, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992); *Brown v. Hartlage*, 456 U.S. 45, 52-53, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) [*862] (per curiam). The closely related right of association is also particularly acute in the context of elections. *Eu*, 489 U.S. at 224-25 (ban on endorsement in primary election acts at "crucial juncture" to prevent parties from promoting candidates who can translate shared ideas into action); *Buckley*, 424 U.S. at 15.

But even among restrictions that touch upon the core First Amendment rights to political speech and association, some restrictions are more burdensome than others, depending on the kind of activity that is restrained and on the nature of the restraint. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 137 L. Ed. 2d 589, 117 S. Ct. 1364 (1997) (standard of review depends on character and magnitude of burden on associational rights). In *Buckley v. Valeo*, both campaign contribution limits and expenditure limits affected core First Amendment expression and association interests, 424 U.S. at 14, yet the contribution limits placed a lesser burden on those interests than the expenditure limits did, *id.* at 19-23. Consequently, contribution limits have been reviewed under a less demanding standard. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897, 903-04, 145 L. Ed. 2d 886 (2000).

In this case, the restriction applies to conduct of candidates for judicial office.[7] There are important differences between judicial office, on the one hand, and legislative or executive office, on the other, that affect the nature of the candidate's interest in certain kinds of policy debate.

> The functioning of the judicial system differs markedly from those of the executive and legislative. In those areas, the public has the right to know the details of the programs that candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable so that voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.

Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991). *Accord Buckley v. Illinois Judicial Inquiry Bd*., 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials . . . in ways that bear on the strength of the state's interest in restricting their freedom of speech."); *In re Chmura*, 461 Mich. 517, 608 N.W.2d 31, 39-40 (Mich.) ("The differences between judges and other government officials bear on the strength of the state's interest in restricting political speech."), *cert. denied*, 148 L. Ed. 2d 40, 121 S. Ct. 77 (2000). Whereas affiliation with a partisan program is thus at the heart of executive and legislative campaigns, a State may conclude that it has no role in judicial campaigns because of the neutral, decision-making nature of the judicial function. "Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind . . . .

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[7]We discuss the claim that Canon 5 also reaches the conduct of persons who are not judicial candidates *infra* at [38a-41a].

[The judicial candidate] cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result." *Morial v. Judiciary Comm'n*, 565 F.2d 295, 305 (5th Cir. 1977). The judicial candidate simply does not have a First Amendment right to promise to abuse his office. *See Brown*, 456 U.S. at 54-56 [*863] (some kinds of campaign promises "may be declared illegal without constitutional difficulty"); *In re Kaiser*, 111 Wn.2d 275, 759 P.2d 392, 400 (Wash. 1988) (holding statements of party affiliation do not refer to subject relevant to judicial qualification and therefore are not protected by First Amendment). Recognizing that the judiciary has a different job to do, Minnesota has provided that its judicial offices are nonpartisan. Minn. Stat. § 204B. 06, subd. 6 (1998); *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992). Thus, restrictions on Minnesota judicial candidates' speech are entirely different from limitations on the speech of candidates for partisan office, such as those in *Eu*, 489 U.S. at 217 (striking statute making it misdemeanor for primary candidates to claim endorsement by party).

Another important aspect of the restraint in this case is that it does not discriminate in favor of one viewpoint or other. Minnesota's restraint of judicial candidates' First Amendment rights is a straightforward restriction of expression, rather than being incidental to some other type of regulation, such as a content-neutral time, place, or manner restriction, and in one sense, it is not content-neutral because it restricts speech on the basis of subject-matter. In *Burson v. Freeman*, 504 U.S. 191, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992), the Supreme Court considered a state law establishing a 100-foot "campaign-free" zone around polling places. Justice Blackmun rejected the assertion that the law was content-neutral: "Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Id.* at 197. Similarly, in this case, the bans

on accepting political party endorsements, attending political party gatherings, identifying oneself as a party member, announcing views on disputed legal and political issues, and soliciting funds depend entirely on the subject matter of the speech. *See Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 2500, 147 L. Ed. 2d 597 (2000) (Souter, J., concurring) (government held to very exacting and rarely satisfied standard when it disfavors discussion of particular *subjects* or articulation of particular viewpoints).

However, the restriction in this case avoids discriminating against a particular viewpoint, which is the most serious threat to First Amendment rights. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-90, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992) (treating "content discrimination" not as an evil in itself, but as evidence that "official suppression of ideas is afoot"). In *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973), the Supreme Court entertained a challenge to the Hatch Act, which prohibited federal employees from taking an active part in political management or political campaigns. The Court prefaced its analysis with the observation that the challenged restrictions did not discriminate on the basis of viewpoint:

> The restrictions so far imposed on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

Id. at 564. *Accord Morial*, 565 F.2d at 301-02 (requirement that sitting judge resign before running for a non-judicial office did not penalize belief in any particular idea and therefore did not touch core First Amendment values). Thus, although [*864]

Canon 5 does burden First Amendment rights, the burden is less onerous than it might otherwise be because Canon 5 does not discriminate on the basis of viewpoint and because it governs only judicial elections.

Because the restrictions on the employees' rights in *Letter Carriers* were similar to those of Canon 5, the defendants suggest we look to *Letter Carriers* and cases following it, which judged restrictions on speech of government employees under a balancing test less rigorous than strict First Amendment scrutiny. *See Letter Carriers*, 413 U.S. at 564. Wersal argues that we cannot apply the *Letter Carriers* balancing test to a restriction on his speech because he is not a government employee. But even though he is not presently a government employee, Canon 5 applies to him only insofar as he seeks to become one. The State can reasonably conclude that Wersal's actions as a candidate could affect his actions as a judge if he is elected, *see Buckley v. Valeo*, 424 U.S. at 26-27 (discussing danger of corruption from contributions to "current and potential office holders"), and so the reasoning of the balancing test cases fairly applies to him. However, the restrictions in this case are different from the Hatch Act provisions challenged in *Letter Carriers* because, while the Hatch Act restrained political activity of government employees, Canon 5 restrains the activity of candidates engaged in an election contest. The burden on the plaintiff in either case may be comparable, but the public's interest in free speech is greater where the person subject to restrictions is a candidate for public office, about whom the public is obliged to inform itself. Therefore, we will invoke strict scrutiny and examine the restrictions at issue to determine whether they are narrowly tailored to serve a compelling state interest.[8] See Stretton, 944 F.2d at 141-42; *see*

[8]The effects of Canon 5 on speech and associational rights, respec-
(continued...)

generally California Democratic Party v. Jones, 530 U.S. 567, 120 S. Ct. 2402, 2412, 147 L. Ed. 2d 502 (2000); *Burson*, 504 U.S. at 198; *Brown*, 456 U.S. at 53-54.

III.

The governmental interests put forth to justify Canon 5 are undeniably compelling. The Boards contend that the restrictions are necessary to guarantee the independence of the Minnesota judiciary, which in turn is crucial to preserve the justice of its courts of law and its citizens' faith in those courts. There is simply no question but that a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order.

> Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others . . . . Justice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted, having been essentially uncontested within the mainstream of the tradition since at least Cicero's time . . . .

Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 227 (7th Cir. 1993). *Accord Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) ("There can be no question . . . that a state has a compelling interest in the integrity of its judiciary . . . . If judicial candidates during a campaign [*865] prejudge cases that later come before them, the concept of impartial justice becomes a mockery."); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("Ours is an era in which members of

[8](...continued)
tively, are so closely intertwined that, having decided to apply strict scrutiny because of the effects on speech, we need not consider whether the effects on associational rights alone would have called for a less rigorous standard.

the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.").

The plaintiffs contend that Minnesota has no interest in the independence of its judiciary because it has chosen to make its judges stand for election. Wersal says: "Contrary to popular understanding—even among lawyers—Minnesota does not have an 'independent' judiciary. Minnesota has an elected judiciary that its founding citizens specifically adopted in the Minnesota Constitution to insure its judiciary was not 'independent' from the voters." Wersal argues that when the citizens at the Democratic[9] Minnesota constitutional convention in 1857 debated whether the judiciary should be appointed or elected, they considered the then-recent *Dred Scott*[10] decision. They decided to choose judges by election and to give them finite terms, rather than life tenure, in order to retain the ability to oust unsatisfactory judges.

The Minnesota Supreme Court has considered the broad history of Minnesota judicial elections and has concluded that the State has historically pursued the ideal of an independent judiciary. In *Peterson v. Stafford*, 490 N.W.2d 418 (Minn. 1992), the Minnesota Supreme Court considered an equal protection challenge to Minn. Stat. § 204B. 36, subds. 4 and 5 (1990), which provided that an incumbent judge should be designated as such on the ballot. In explaining the reason for the designa-

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[9]In Minnesota there were two constitutional conventions, one Democratic and one Republican. The two drafts resulting from those conventions were consolidated and then submitted for ratification. *Peterson v. Stafford*, 490 N.W.2d 418, 420 n. 10 (Minn. 1992).

[10]*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1856).

tion, the court identified the underpinnings of the Minnesota selection process as the search for an independent judiciary:

> The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences[11] . . . . While the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.

Id. at 420. *Peterson* traced the history of the Minnesota judicial selection process beginning with the adoption of the Minnesota Constitution in 1857, which provided that judges of the Supreme Court should be elected for seven-year terms, Minn. Const. art. 6, § 3 (1857), so that judicial elections did not coincide with elections for other offices. 490 N.W.2d at 420. Moreover, the 1857 Constitution provided that judges must be "learned in the law." Minn. Const. art. 6, § 5 (1857). "Implicit in this requirement is recognition that those elected as judges will be subject to the restrictive canons of conduct governing the profession of law." 490 N.W.2d at 422. [*866] The term length was reduced to six years in 1883, which made more apparent the "difficulties associated with partisan judicial elections." *Id.* at 420. In 1912, the legislature enacted nonpartisan ballot legislation, Act of June 19, 1912, ch. 2, 1912 Minn. Laws, Spec. Sess. 4-6, which made the State's judicial offices

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[11]The Minnesota Supreme Court has thus with great precision and specificity answered the dissent's rhetorical question, "Independent from what?" *Infra* at [62a].

nonpartisan. *See id.* at § 182. The court characterized this reform as an attempt to ensure the "judicial impartiality required to decide cases free from political maneuvering." 490 N.W.2d at 422.

Further, the Minnesota Constitution provided that whenever there was a judicial vacancy, the governor should appoint the successor, who would serve until his successor was elected.[12] Minn. Const. art. 6, § 10 (1857). In 1972, at the time when the State was studying the possible advantages of a merit selection plan, the time frame for this successor election was extended from the next general election occurring more than thirty days after the vacancy to the next general election occurring more than one year following the vacancy, in order to allow the electorate enough time to assess the new judge's competence. Minn. Const. art. 6, § 8 (amended 1972); *see Peterson*, 490 N.W.2d at 422-23.

In the context of this history, *Peterson* held that the ballot designation of the incumbent was rational:

> It seems clear that Minnesota has adopted its own middle-of-the-road approach to judicial selection. The open election process has been retained, but with a quasi-retention feature which simply informs the voter who the incumbent candidate is and who the challenger is. This arrangement acts as a check on the gubernatorial appointment process by keeping the ultimate choice with the voters while, at the same time, recognizing the unique independent nature of the judicial function.

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[12]Since 1991 a judicial selection commission, which is composed of members appointed by the governor and by the justices of the supreme court, evaluates the merits of applicants for mid-term vacancies and recommends to the governor three to five nominees for each open position. Minn. Stat. § § 480B. 01, subds. 2, 8-11 (1998).

490 N.W.2d at 425. Thus, the Minnesota Supreme Court has considered in depth the history and structure of Minnesota judicial elections procedures and has concluded that they are designed in large part to protect the independence of the State's judiciary.[13]

Other courts considering the same question have held that the decision to elect [*867] judges cannot be regarded as abandonment of a State's interest in an independent judiciary. *See Buckley*, 997 F.2d at 227 ("Judges remain different from legislators and executive officials, even when all are elected . . . ."); *Stretton*, 944 F.2d at 142 ("The fact that a state chooses to select its judges by popular election . . . does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly."); *In re Chmura*, 461 Mich. 517, 608 N.W.2d 31, 39-40 (Mich.) ("By providing for the election of judges, the people of Michigan have not transformed judges

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[13]The dissent concludes that *Peterson*'s use of the phrase "independent 'as possible,'" *infra* at [70a], must be viewed, not in light of *Peterson*'s detailed historical review, but rather in light of the dissent's independent review of Minnesota history. See *infra* at [62a-70a]. The deference we must give to state court opinions on matters of state law does not allow us to supplant *Peterson*'s considered views in favor of our own de novo interpretation, nor may the dissent. The dissent also states that Canon 5 "subverts" Minnesota's policy, *infra* at [70a], and seemingly presumes that Canon 5 is not part of state law because it emanates from the state supreme court, rather than from the state legislature. No one, including the dissent, has questioned the authority of the Minnesota Supreme Court to promulgate ethical rules for incumbent judges and judicial candidates. The same federalism principles which require us to defer to state courts' interpretations of state law and to recognize that state laws embody the will of a State also dictate that we recognize Canon 5 as a regulation that expresses Minnesota's will as a sovereign entity. See *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 534, 148 L. Ed. 2d 388 (2000) (Rehnquist, C. J., concurring) ("in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character").

into legislators or executives . . . ."), *cert. denied*, 148 L. Ed. 2d 40, 121 S. Ct. 77 (2000).

The governmental interest in an independent and impartial judiciary is matched by its equally important interest in preserving public confidence in that independence and impartiality. *See Cox v. Louisiana*, 379 U.S. 559, 565, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965) ("A State may also properly protect the judicial process from being misjudged in the minds of the public."); *Suster v. Marshall*, 149 F.3d 523, 532 (6th Cir. 1988) (State's interest in preventing judicial corruption or appearance of corruption compelling); *cf. Reeder v. Kansas City Bd. of Police Comm'rs*, 733 F.2d 543, 547 (8th Cir. 1984) ("It is proper for a state to insist that the police be, and appear to be, above reproach, like Caesar's wife."). *Letter Carriers* stressed that the appearance of corruption resulting from partisan activities of government employees could affect the entire government: "It is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565.

Finally, a State has an interest in protecting its judges from pressure to participate in partisan activities, if it reasonably concludes that this protection is necessary to retain a high caliber of judges. "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978) (Stewart, J., concurring in judgment). *Letter Carriers* applied an analogous principle when it justified the Hatch Act partly on the ground that it meant to protect government employees from political pressure from their superiors. 413 U.S. at 566-67.

We therefore conclude that the Lawyers and Judicial Boards have shown compelling governmental interests[14] to justify [*868] Canon 5, and we turn to the necessity and narrow tailoring of the various restrictions found within it.

IV.

We first address Wersal's challenge to the three provisions of Canon 5(A) that prohibit him from attending political party gatherings; from seeking, accepting, or using endorsements from a party; and from identifying himself as a member of the party, except as necessary to vote. Minn. Code of Jud. Conduct Canon 5(A)(1)(a) & (d) (1998).[15]

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[14]In arguing that the state interests we have identified are not compelling, the dissent relies on *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978), in which the State sought to govern not the conduct of judges, but of the press in reporting on judicial disciplinary proceedings. The dissent's discussion of *Landmark Communications* suggests that the compelling interest we rely on is protection of judges from criticism. *Infra* at [83a-84a]. We rely on the State's interest in its judges' integrity and independence, which requires keeping judges from doing (or appearing to do) things that compromise their neutrality, rather than keeping others from talking or writing about them. Minnesota seeks not to "shield[] judges from published criticism," *infra* at [84a] (quoting *Bridges v. California*, 314 U.S. 252, 270-71, 86 L. Ed. 192, 62 S. Ct. 190 (1941)), but to prevent them from deserving such criticism. Moreover, the Supreme Court in *Landmark Communications* did not reject the legitimacy of the State's proffered interests in the reputation of its judiciary and the integrity of its disciplinary proceedings, but held that the State had not shown that these interests would be "seriously undermined" unless the State could use criminal sanctions against the defendant newspaper. [435 U.S.] at 841, 845.

[15]Canons 5(A)(1)(a) and (d) provide:

> Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B. 06 Subd. 6.
> (1) Except as authorized in Section 5B(1), a judge or a candidate

(continued...)

A.

We must determine whether these restraints protect Minnesota's interests in the integrity and quality of its judiciary. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 1891, 146 L. Ed. 2d 865 (2000). The burden of proof rests with the State. [120 S. Ct.] at 1888.

A threshold question is what sort of evidence the Boards must provide substantiating the threat to the governmental interest. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000), the Supreme Court declined to answer this question definitively, [120 S. Ct.] at 907, but gave this guidance: "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 906. The asserted danger to the governmental interest in that case, danger of corruption attendant on large campaign contributions, was neither novel nor implausible, so that the State's burden was amply satisfied by its production of a state senator's affidavit and newspaper articles showing cases of apparent corruption. *Id.* at 907-08. The Court also assigned some evidentiary value to the passage of a campaign contribution limitation by a large margin at a referendum, which demonstrated public concern

[15](...continued)
for election to judicial office shall not:

> (a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election.
>
> ....
>
> (d) attend political gatherings; or seek, accept or use endorsements from a political organization ....

about corruption.[16] *Id.* at 908. The Court quoted *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), in which the city's evidence was said to be adequate, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." [120 S. Ct.] at 907 n.6. *Shrink Missouri* also noted the lack of evidence tending to disprove the State's theory. *Id.* at 908.

The idea that judicial integrity is threatened by judges deploying political organizations in connection with campaigns for judicial office is neither novel nor implausible. In *Letter Carriers*, the Supreme Court recognized that partisanship of governmental officials created a risk of corruption that justified the restraint of those officials' partisan activities. Although the Hatch Act applied to employees of the [*869] executive branch, the Court's reasoning could as well have been written about judges and in fact applies with even greater urgency to them:

> It seems fundamental in the first place that employees in the Executive Branch of the government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees, for example, not take formal posi-

[16]We held the voter initiative imposing contribution limits invalid under the First Amendment in *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995); consequently, its restrictions were not in force when *Shrink Missouri* was decided.

> tions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.

United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 563-64, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973). *Accord LaMontagne v. St. Louis Dev. Corp.*, 172 F.3d 555, 557 (8th Cir. 1999) (city employees), *cert. denied*, 528 U.S. 873, 120 S. Ct. 176, 145 L. Ed. 2d 148 (1999); *Reeder v. Kansas City Bd. of Police Comm'rs*, 733 F.2d 543, 547 (8th Cir. 1984) (police officers); *Otten v. Schicker*, 655 F.2d 142, 144 (8th Cir. 1981) (same).

The restriction here was adopted by the Minnesota Supreme Court, which has consistently over time perceived partisanship as posing a particular threat to judicial integrity. Canon 7(A) of Minnesota's 1974 Code of Judicial Conduct also restricted a judicial candidate's political activities broadly, specifically permitting a candidate for elective judicial office to appear at "*other than partisan political gatherings* during the year in which he is a candidate." Minn. Code of Judicial Conduct Canon 7(A)(2) (1974) (emphasis added). The comments of the advisory committee accompanying the 1995 Minnesota Code of Judicial Conduct state: "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor." Canon 1(A) cmt. In proposing to the court the 1997 amendments to clarify the prohibitions on partisan conduct the Judicial Board stated: "The Judicial Standards Board members believe the proposed language changes will make it clear that judicial elections are to be nonpartisan. Minnesota has a long tradition of nonpartisan judicial elections, and these changes will assure a strong, independent judiciary."

Long before the present canons were adopted, justices of the Minnesota Supreme Court had also expressed the idea that merely avoiding party designations on the ballot was insufficient to protect the Minnesota judiciary from the dangers of partisan involvement. In *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (Minn. 1939), a candidate for registrar of deeds, an office designated by statute as nonpartisan, had solicited and received the endorsement of a political party. The court held that the Minnesota nonpartisan statute prescribed only that the candidate's party affiliation could not appear on the ballot and that the candidate could not declare his party when filing for office. The statute did not forbid party endorsement of candidates for nonpartisan office. 288 N.W. at 581. Justice Loring, joined by Justice Olson, concurred specially to add that this statute was not sufficient to protect the State's judiciary [*870] from the dangers of partisan pressure, which he felt had been at work:

> When candidates for such offices were placed on a nonpartisan ballot it was, it seems to me, the purpose of the legislature to lift the judgeships above sordid political influence and to free the candidates from obligation to a political party so that if elected they might render judicial instead of partisan political decisions on matters where party programs, party interests or even prominent party leaders might be involved. The abuse and accusations of party treason which have been heaped upon some judges in the recent past because of decisions thought to be contrary to the interests of an indorsing party ought to be evidence enough of the impropriety of party indorsements and of their purpose to induce partisan political rather than impartial judicial decisions.

Id. at 581-82.

More recently, the court in *Peterson v. Stafford*, 490 N.W.2d 418, 425 (Minn. 1992), stated that the nature of judicial office requires the "holder studiously to avoid partisan politics, refrain from all discussions of public issues and restrict one's membership and participation in organization to those primarily of a professional nature."

Additionally, the Boards have adduced evidence of the necessity of reform measures in the form of affidavits by a former governor, Arne H. Carlson, and a former Chief Justice of the Minnesota Supreme Court, A.M. (Sandy) Keith. Chief Justice Keith was a member of the Minnesota Supreme Court when the Court considered and approved the amendments to Canon 5. He testified that, based on his experience, if the Minnesota Code were changed to permit partisan activity, judges would be under pressure to "decide cases in ways that would impress the judge's supporters favorably," and eventually, partisanship would damage the public's confidence in the judiciary. Governor Carlson testified: "For the public to read newspaper headlines that a political party has endorsed and will work to elect a particular candidate would greatly harm the public's confidence in the independence of the judiciary." Both Chief Justice Keith and Governor Carlson testified that they believed that allowing judicial elections to become partisan contests would discourage many qualified candidates from seeking election.

The Boards have also produced a news account of the dangers partisan elections have posed in Texas, which included interviews with witnesses who believed that judges' decisions were affected by the need for political and financial support and that the public perceived "that justice is for sale in this state." Editorials from Texas newspapers reported a public perception that rulings were influenced by campaign obligations. The testimony at the 1997 hearing before the Minnesota Supreme Court on the proposal to amend Canon 5 was replete with

references to the undesirable situation existing in other States with partisan judicial elections, particularly Texas. *Amendment to Canon 5 of the Code of Judicial Conduct: Hearing Before the Minnesota Supreme Court*, No. C7-81-300, at 32, 36, 50, 65-68 (1997).

In contrast to the evidence amassed by the Boards, the plaintiffs have not adduced evidence tending to disprove the threat to the integrity or reputation of the judiciary from involvement with partisan politics. *See Shrink Mo.*, 120 S. Ct. at 908. This is an issue where "a long history, a substantial consensus, and simple common sense," *Burson*, 504 U.S. at 211, combine to show that regulation is necessary to protect the institution of the judiciary from the dangers of partisanship and [*871] corruption. The record suffices to support the Minnesota Supreme Court's assessment that the threat of actual and apparent corruption is real and reform measures are necessary. *Cf. Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 229, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989) (striking ban on party endorsement of candidates in party primaries where there was no evidence that ban served purpose of preventing fraud and corruption). Additionally, there is record evidence showing that without protection from partisan pressures, the State will be less able to recruit judicial candidates of the highest caliber.

The dissent contends that Canon 5 is not necessary because it does not achieve its stated end. *Infra* at [87a-88a]. The argument is not precisely that Canon 5 does not accomplish its end as far as it goes, but that it is underinclusive—in other words, that the measure does not eliminate all the conduct posing the threat the government claims to be addressing because a candidate may attend meetings of and accept endorsements from politically active groups other than political parties. The dissent contends that in cases burdening a fundamental right "failure to solve the entire asserted problem

is fatal." *Infra* at [87a] n. 44 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996), and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993)). Wersal makes a similar argument, relying on *Carey v. Brown*, 447 U.S. 455, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980), and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992). These cases do not stand for such a broad rule. Generally, underinclusiveness of a speech regulation is not an independent ground for invalidating the regulation, but rather points to the possibility that the government is discriminating on the basis of content or that the government's asserted interest is not truly pressing. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51-53, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 493, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997) (Souter, J., dissenting). When underinclusiveness of a regulation betrays content-discrimination, the standard of review must be raised to strict scrutiny. For instance, *R.A.V.* invalidated an ordinance prohibiting fighting words directed at some groups, but not others. The Supreme Court held that the principle for distinguishing between fighting words that were prohibited by the ordinance and those that were not had nothing to do with the rationale for permitting regulation of fighting words in the first place, but instead amounted to content discrimination. Therefore, the Court could not apply the relaxed standard appropriate for review of regulations of fighting words. 505 U.S. at 386. The ordinance failed under strict scrutiny review. *Id.* at 395-96. In this case, we have already established that Canon 5 discriminates on the basis of content (though not on the basis of viewpoint) and that we must conduct strict scrutiny. *Supra* at [18a-21a].

In cases in which underinclusiveness of a regulation suggests that the regulation is not truly necessary to further a

compelling governmental interest, the government's obligation is to "establish the empirical reality of the problems it purports to be addressing." *Glickman*, 521 U.S. at 493 (Souter, J., dissenting). As part of our strict scrutiny, we have determined that the State established that a candidate's use of political parties in judicial campaigns poses a real threat to the State's compelling interests. *Supra* at [28a-30a]. Thus, we have already undertaken the heightened scrutiny that underinclusiveness [*872] of a regulation would suggest is necessary.

But even if the cases cited by the dissent and Wersal indicated that underinclusiveness poses a First Amendment problem in its own right, these cases concern only arbitrary underinclusiveness, which arises when the principle for distinguishing regulated conduct from non-regulated conduct does not promote the government's asserted purpose. In *Carey*, 447 U.S. at 457, 464, the challenged regulation prohibited residential picketing other than labor picketing in order to protect residential privacy. In *Discovery Network*, 507 U.S. at 415, the city banned use of newsracks to distribute commercial handbills, but not newspapers, as a way of preventing newsracks from becoming a safety hazard and eyesore. The types of picketing and newsracks, respectively, that were regulated posed no greater threat to the asserted governmental interest than those that were exempted from regulation, and the regulations were thus invalid. *See Carey*, 447 U.S. at 465; *Discovery Network*, 507 U.S. at 424-28. In *44 Liquormart* a ban on advertising alcoholic beverages was invalid where any connection between the advertising ban and the State's desired result of reducing alcohol consumption would have been "purely fortuitous." 517 U.S. at 506-07 (Opinion of Stevens, J.).

In contrast to these cases, when underinclusiveness results from a choice to address a greater threat before a lesser, it does not run afoul of the First Amendment. *See, e. g., Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 470-71 (8th Cir.

1991); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991) ("We cannot say that the state may not draw a line at the point where the coercive effect [of judicial campaign fund-raising], or its appearance, is at its most intense—personal solicitation by the candidate."). Indeed, a categorical rule against underinclusiveness for its own sake would coerce governments to regulate speech more broadly than they consider necessary, which is hardly the usual goal of First Amendment jurisprudence.[17] Here, the State has shown that a candidate's use of political parties in judicial campaigns poses a greater threat to the compelling state interests than involvement of other kinds of groups. *See infra* at [42a-43a]. Therefore, the State did not violate the First Amendment in so limiting Canon 5.

B.

As the final step of our review of the three restrictions on Wersal's political activity, we ask whether they are narrowly drawn to address the compelling state interests. *See California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 2412, 2414, 147 L. Ed. 2d 502 (2000); *Brown v. Hartlage*, 456 U.S. 45, 54, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982) (restriction must operate without "unnecessarily circumscribing protected expression").

The Minnesota Supreme Court has attempted to prevent judicial candidates from incurring, or seeming to incur, debts to political parties that could compromise their independence, while allowing them alternative means of communicating subjects of valid interest to voters. Candidates may, for instance, speak to gatherings other than political organization

[17]It is significant that the dissent in this case first argues that the Minnesota Supreme Court has violated the Constitution in enacting Canon 5, and then makes the antithetical assertion that it has not gone far enough.

gatherings; appear in newspaper, television, or other media advertisements supporting [*873] their candidacy; and distribute pamphlets and other promotional literature. Canon 5(B)(1). Furthermore, candidates may establish committees to campaign for them in various ways, including obtaining public statements of support (other than from political organizations). Canon 5(B)(2).

Wersal argues that since various other States and the drafters of the ABA Model Code of Judicial Conduct have not found it necessary to forbid attendance at party gatherings, acceptance of party endorsements, and identification of party affiliation, Minnesota's restrictions must be broader than necessary. But Wersal relies on the laws of States that have in fact limited political activity by measures similar to those before us.[18] There is also the authority of *Letter Carriers* and the other cases in which courts held it was proper to limit partisan political activity of executive employees. *See supra* at [26a-27a].

The Party contends that the prohibition on disclosing party affiliation is not narrowly tailored because it prohibits disclosing past party affiliation as well as present. The Judicial Board states that it "simply prevents the judge from affirmatively stating his *current* political affiliation." However, the report submitted to the Minnesota Supreme Court at the time the

[18]*E.g.*, Fla. Code of Jud. Conduct Canon 7(C)(3) (imposing various limits on speaking at political gatherings, including prohibition on announcing party affiliation); Ky. Sup. Ct. R. 4.300, Canon 5(A)(2) (allowing candidate to state party affiliation only in response to direct question); Okla. Stat. Ann. tit. 20, § 1404(B)(6) (West 1991 & Supp.) (making it a ground for removal of judge from office to make party affiliation publicly known in connection with campaign for office); Or. Code of Jud. Conduct JR 4-102, 4-104 and Or. Rev. Stat. § 249.015 (1999) (candidate shall not publicly identify candidate's political party membership except by registering to vote); S.D. Code of Jud. Conduct Canon 5(C)(1)(a)(ii) (permitting candidate to identify party affiliation only to vote); Wash. Code of Jud. Conduct Canon 7(A)(1)(e) (same).

party affiliation language was adopted states that it would prohibit candidates from identifying themselves "as past or present members of a political organization." The language was adopted as proposed. The Minnesota Supreme Court apparently concluded that the public would infer that identification of past membership was tantamount to identification of present membership. *See In re Kaiser*, 111 Wn.2d 275, 759 P.2d 392, 395 (Wash. 1988) (en banc) (concluding judge violated prohibition on stating party affiliation by stating past affiliation). It was therefore reasonable to extend the prohibition on stating party affiliation to include past affiliation as well, lest the measure be rendered ineffective.

The Party further contends that Canon 5 is not narrowly tailored because Canon 5(A)(3) applies to a candidate's supporters as well as to the candidate. Specifically, Maxim argues that he had to avoid "seeking out any relationship with Gregory Wersal" in order to avoid coming within the scope of persons who were prohibited by Canon 5(A)(3) from doing for Wersal what he could not do for himself—i.e., attending a party gathering or seeking a party endorsement. Similarly, the members of Wersal's campaign committee contend that the restriction is overbroad because the committee was prohibited from seeking a party endorsement of Wersal. This argument has two parts: first, that the regulation is overinclusive because it affects third parties who have a relationship with Wersal; and second, that the regulation is vague because third parties cannot predict under what circumstances their actions will be imputed to Wersal.

Two district court cases have anticipated the overinclusiveness issue. In *Concerned* [*874] *Democrats v. Reno*, 458 F. Supp. 60, 65 (S. D. Fla. 1978), and *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N. D. Cal. 1996), courts held that state laws prohibiting political party endorsements of judicial candidates or of all nonpartisan

candidates, respectively, were not narrowly tailored because they restricted the political parties' behavior when it was only necessary to restrict the candidate's behavior. Lungren assumed, arguendo, that the State had a compelling interest in preventing nonpartisan office holders from engaging in partisan activity, but held that the law "missed the mark" in addressing that interest:

> The evil sought to be combatted is the unseemly partisanship of nonpartisan officeholders once they are in office, not the partisanship of political parties (which, of course, is the very nature of political parties). Section 6(b) purports to prevent officeholders from being "beholden" to political parties by imposing a ban on the parties' speech about candidates for office, rather than (as the Supreme Court approved in *Letter Carriers*) a ban on the partisan political conduct of the officeholders themselves. The distinction is crucial. The government has an interest in the manner in which its elected officials conduct themselves while in office. The government does not and cannot have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates for those offices.

919 F. Supp. at 1402.

These district court cases convincingly reason that because the State's compelling interest is in the rectitude of the candidate, a narrowly tailored restriction will regulate expressions by the candidate, not third parties. However, the language of Canon 5(A)(3) is so limited. It does not purport to govern what other persons do, but what the candidate authorizes or knowingly permits them to do. The canon therefore does not affect persons not subject to the candidate's authority and control. *See Johnson v. Holzemer*, 263 Minn. 227, 116 N.W.2d

673, 679 (Minn. 1962) ("knowingly permit" extends only to persons having right of authoritative control over actor who are actually aware of his or her activity). Canon 5(A)(3) simply prohibits the candidate from accomplishing by the acts of an agent what the candidate is forbidden to personally. The Director of the Lawyers Board, the body charged with enforcing Canon 5(A)(3) in Wersal's case, confirms that there is no threat of disciplinary action without the candidate himself authorizing or permitting the action of the supporter. Insofar as Canon 5(A)(3)(a) refers to members of the candidate's family, it does not limit their activities, but rather affects the candidate's actions towards them: the candidate shall "encourage" them to adhere to the standards applicable to the candidate. As for persons who are within the candidate's authority and control as members of the candidate committees authorized by Canon 5(B)(2), they have voluntarily assumed that relation, and therefore may subject themselves to certain restraints which are necessary to make effective the restrictions on the candidate. *Cf. Letter Carriers*, 413 U.S. at 581-82 (Appendix to the Court's opinion) (United States Civil Serv. Comm'n Form No. 1236, which Congress intended to serve as its definition of the general proscription against partisan activities, id. at 572-74, prohibits "activity by indirection" when, by collusion or coercion, employee causes another to do what employee may not do directly). The limitation of Canon 5's reach to the candidate and to persons within the candidate's control thus distinguishes this case from *Eu*, 489 U.S. at 221, [*875] in which there was an "outright ban" on political parties endorsing candidates.

The Party argues that a candidate's supporters cannot tell under what circumstances their actions will be imputed to the candidate. A restriction on speech must not be so vague that people of ordinary intelligence cannot tell what it prohibits. *Broadrick v. Oklahoma*, 413 U.S. 601, 607, 37 L. Ed. 2d 830, 93

S. Ct. 2908 (1973). *But see Berger v. Supreme Court*, 861 F.2d 719, 1988 WL 114792, at *3 (6th Cir. Oct. 31, 1988) (notice requirements less stringent in enforcing non-criminal code of judicial conduct than if criminal penalties at stake). Canon 5(A)(3)(c) limits the scope of its language by adding the requirement that the candidate's permission be "knowing." This requirement prevents the sort of violation by mistake the non-candidate plaintiffs claim has chilled their speech. *See Chulchian v. City of Indianapolis*, 633 F.2d 27, 31 (7th Cir. 1980) (ordinance prohibiting person from "permitting" conduct includes requirement that person know of conduct and therefore is not unduly vague). Moreover, both Canon 5(A)(3)(a), dealing with family members, and Canon 5(A)(3)(c), dealing with authorizing or knowingly permitting others to act, include the concept of the candidate's right to control the speaker. *Johnson*, 116 N.W.2d at 679. Canon 5(A)(3) is therefore not unduly vague.

C.

The Party contends that the restrictions on a candidate's partisan activity violate its rights to equal protection because Canon 5 restricts association with political parties, but not other organizations that could affect a judge's independence or the public's perception of that independence. We have already determined that the restraints on Wersal's speech and association are necessary to serve a compelling state interest. To conclude that the same restraints violate the Equal Protection Clause, we would have to determine that Canon 5 burdens the rights of political party members more than others and that "such differential treatment is not justified." *California Med. Ass'n v. FEC*, 453 U.S. 182, 200, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981). In *Broadrick*, in rejecting a First Amendment overbreadth challenge to Oklahoma's restrictions on partisan activities by government employees, the Supreme Court also rejected an equal protection challenge to the same law:

> Appellants also claim that § 818 violated the Equal Protection Clause of the Fourteenth Amendment by singling out classified service employees for restrictions on partisan political expression while leaving unclassified personnel free from such restrictions .... The legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.

413 U.S. at 607 n. 5 (citation omitted).

Our discussion regarding the State's interest in the independence of its judiciary demonstrates how Minnesota has historically viewed partisanship as a particular threat to the integrity of its courts, *supra* at [30a-36a], and we need not reiterate this discussion. Restrictions reaching only partisan, rather than nonpartisan, political activity have been upheld in other cases. *See Letter Carriers*, 413 U.S. at 562; *Bauers v. Cornett*, 865 F.2d 1517, 1524-25 (8th Cir. 1989) (application of statutes to nonpartisan activity would have raised a different constitutional question [*876] than application to partisan activity). Political parties specialize in the business of electing candidates and have a powerful machinery for achieving that end, including large membership and fund-raising organizations. Those parties are simply in a better position than other organizations to hold a candidate in thrall. Moreover, because political parties have comprehensive platforms, obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues. Finally, legislatures are bodies in which, for the most part, the members owe allegiance to a political party, not only for financial support and endorsement in their campaigns for office, but also for political support within the legislative process itself. No single legislator has the

power to enact laws. Therefore, the sharing of common partisan affiliation plays an integral role in enactment of legislation. If the judiciary is then expected to review such legislation neutrally, a State may conclude that it is crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it.

It is also relevant that a judge's participation in associations other than political parties is regulated by Canon 4, which imposes broad requirements that judges avoid involvement that could cast doubt on their impartiality or interfere with proper performance of their judicial duties. At the Minnesota Supreme Court's 1997 hearing on amending Canon 5, DePaul Willette, Executive Secretary of the Judicial Board, testified that the danger of judicial candidates affiliating with single-issue interest groups was adequately addressed by the provision of Canon 5 prohibiting announcement of the candidate's views on disputed legal or political issues, Canon 5(A)(3)(d)(i). *Amendment of Canon 5 of the Code of Judicial Conduct: Hearing before the Minnesota Supreme Court*, No. C7-81-300, at 12-13 (1997).

We conclude that the State has justified its differential treatment imposing greater restrictions on a judicial candidate's partisan political activities than on association with other kinds of organizations.

V.

We turn next to Wersal's claim that Canon 5's "announce" clause, which prohibits judicial candidates from announcing their "views on disputed legal or political issues,"[19] violates his

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[19]Canon 5(A)(3)(d)(i) provides that a judge or a candidate for judicial office shall not:

> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(continued...)

free speech rights because it is not narrowly tailored to achieve any compelling state interest.[20] We have already determined that the interests proffered by the State to justify this restriction are compelling governmental interests of the highest order, so we proceed to the next step of our inquiry and [*877] address whether the restriction is necessary to further these interests. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 1891, 146 L. Ed. 2d 865 (2000); *see also Brown v. Hartlage*, 456 U.S. 45, 53-54, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982).

A.

As we have discussed, it is consistent with the essential nature of campaigns for legislative and executive offices for candidates to detail and make promises about the programs that they intend to enact into law and to administer. For judicial officers, however, a State may determine that this mode of campaigning, insofar as it relates to how judges will decide cases, is fundamentally at odds with the judges' obligation to

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[19](...continued)
announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent.

[20]Wersal also challenges the announce clause as being vague. However, his argument is based solely on the clause's relationship to Canon 5(A)(3), which prevents him from "knowingly permitting" others to announce his views on his behalf. We have already held *supra* at [40a] that the "knowingly permit" language is not unconstitutionally vague, and we therefore reject this claim. Furthermore, our clarification of the "knowingly permit" language is dispositive of the Party's claim that the announce clause is unconstitutional as applied to third parties. Candidates are subject to discipline only when third parties act as agents of the candidate or have voluntarily assumed a relationship with the candidate as a member of the candidate's campaign committee. The Code does not regulate the independent activities of third parties.

render impartial decisions based on the law and facts. At the time of the campaign, the candidate simply cannot predict what the facts or arguments in a particular case may be, the precise way in which legal issues will present themselves, or other crucial factors that need be considered before a court issues a final decision. *See Berger v. Supreme Court*, 861 F.2d 719, 1988 WL 114792, at *3 (6th Cir. Oct. 31, 1988) ("The very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office.") (internal quotations omitted); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993) (free discussion of judicial candidate's views conflicts with the "historically more deeply rooted" concept of justice under the law); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) (prejudging cases at campaign stage makes mockery of the concept of an impartial judiciary and undermines public confidence in rule of law).

Canon 5's announce clause restrains candidates from making statements in their campaigns about their views on disputed legal and political issues, and thus prevents candidates from implying how they would decide cases that might come before them as judge. Wersal maintains that this restriction is not necessary because Canon 5 already protects the State's interests through bans on candidates making pledges or promises of conduct in office other than the faithful performance of their duties and on candidates manifesting bias or prejudice inappropriate to the judicial office. *See* Canon 5(A)(3)(d)(i) & (ii).

To be sure, the pledges and promises provision of Canon 5(A)(3)(d)(i) addresses the type of campaign conduct that most blatantly subverts the judicial office—pledges by candidates to make specific decisions on the bench. However, it does not reach the full range of campaign activity that can undermine the State's interests in an independent and impartial judiciary. It

would not, for example, reach declarations by candidates that legislation relating to hot-button social issues is or is not constitutional. It also would not apply to candidates who publicized their opinions about how unsettled legal issues should be resolved. Both instances raise the specter that the candidates are declaring how they would decide questions that might come before them as judges in order to gain support for their candidacies. *See Laird v. Tatum*, 409 U.S. 824, 836 n. 5, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972) (Rehnquist, J.) (Mem. on Motion for Recusal) ("In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he [*878] deliberately was announcing in advance, without the benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.").

When a candidate is later called upon as a judge to preside over cases involving disputed issues about which he or she has made campaign announcements, the judge is placed in an awkward, if not impossible, position. Should the judge properly determine, for example, that a law violates the Constitution, having already expressed this opinion during the campaign, the judge risks appearing as though he or she prejudged the case rather than gave it due consideration in light of the law, arguments, and facts. This apparent rigidity can undermine the faith of the litigants and public in the judge's decision and in the State's judicial system generally. *See Stretton*, 944 F.2d at 142. On the other hand, should the judge reach a conclusion that departs from the opinion expressed during the campaign, the judge risks being assailed as a dissembler. Thus, the judge may hesitate to decide the case in a way that might lose votes at the

next election. Certainly, many judges have the fortitude to resist such pressures, but we do not doubt that the potential of supporter abandonment at the next election can weigh heavily on judges who know they were elected based on representations they made during the last campaign. *Cf. The Federalist No. 78*, at 471 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (arguing against periodic popular election of judges because it gives them "too great a disposition to consult popularity" when rendering decisions).

Wersal does not explain why he believes the canon restricting candidates from manifesting bias or prejudice inappropriate to judicial office fully protects the State's interests left unshielded by the ban on candidates making improper pledges and promises, and we conclude it does not. Canon 5(A)(3)(d)(ii) was added to the Code when the Minnesota Supreme Court updated its ethical rules and brought them closer to the 1990 version of the ABA Model Code, some twenty-two years after the announce clause was promulgated; and we do not read the two provisions to address the same conduct. The manifestation of bias provision, fairly read, is directed at words and conduct that display personal animus against persons or groups, such as women or minorities. Even if it could be construed to cover announcements about how a candidate would decide cases if elected, settled rules of statutory interpretation require that we decline to read it in this way. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976) (subsequently enacted law cast in general terms should not be interpreted to supplant one dealing with specific subject unless absolutely necessary to give effect to the language). We therefore reject any implication that the adoption of the manifestation of bias provision rendered the announce clause unnecessary.

Wersal also challenges the sufficiency of the evidence the Boards have put forth to justify this speech restriction. He

argues that the State did not fulfill its evidentiary obligation as a matter of law because the Boards did not prove there was any concrete evidence showing the harmfulness of candidates announcing their views in the public record before the Minnesota Supreme Court at the time the court adopted the announce clause. This argument misapprehends the Boards' evidentiary burden in this case.

In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897, 907-08, 145 L. Ed. 2d 886 (2000), for example, the Court stated that to sustain a [*879] law setting contribution limits, it was enough for the State to adduce evidence substantiating legislative concerns about the actual or perceived corruption associated with large contributions. As we have noted *supra*, the corroborating evidence included a state senator's sworn statement that "large contributions have 'the real capacity to buy votes,'" contemporaneous newspaper accounts tending to show public officials were actually corrupted by contributions, and the recent overwhelming passage of a statewide initiative indicating that the majority of voters had concluded that contribution limits were necessary. *Id.* None of these items were shown to be part of the public record before the legislature at the time the legislature enacted the law.

Burson v. Freeman, 504 U.S. 191, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992), provides an example of the type of corroborating evidence that can support a speech restriction subject to strict scrutiny. In *Burson*, the Court entertained a challenge to a law establishing a 100-foot "campaign-free" zone around polling places that was designed to protect against voter intimidation and election fraud. As evidence showing that the law was necessary, the Court looked to nineteenth century ballot reforms and traced the development of restrictions on election-day electioneering. *Id.* at 202-05. It also noted that all fifty States limit access to areas in or around polling places. *Id.* at

206. Taken together, this evidence revealed a "widespread and time-tested consensus" about the problems of voter intimidation and voter fraud which corroborated the State's conclusion that some sort of "campaign-free" zone around voting compartments was necessary. *Id.*

In this case, the Boards have met their evidentiary burden by offering evidence of widespread and longstanding consensus among members of the bench and bar about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way. Three-quarters of a century ago, the ABA promulgated the nation's earliest formalized standards of professional conduct for judges, the Canons of Judicial Ethics. Canon 30 provided that a candidate for judicial office "should not announce in advance his conclusions of law on disputed issues to secure class support." Canon 30 (1924). Developed and drafted by a committee chaired by Chief Justice William Howard Taft and later approved by delegates to the ABA's 1924 annual meeting, see Jeffery M. Shaman et al., *Judicial Conduct and Ethics* § 1.02 (3d ed. 2000), the canon reflects the views of members of the legal profession as to what ethical restrictions are needed to protect the integrity of the judiciary. Many state courts reached similar conclusions and adopted the ABA Canons for their own jurisdictions, *id.* at § 1.02 n. 14, including the Minnesota District Judges Association, whose members voted to do so unanimously at a conference in 1950.

In the early 1970s, the ABA committee charged with drafting the Model Code of Judicial Conduct included a restriction on candidate speech similar to the restriction contained in 1924 code. *See* ABA Model Code of Jud. Conduct Canon 7(B)(1)(c) (1972). The ABA's 1972 Model Canon 7 is the pattern on which Minnesota's announce clause is based, and a majority of States that have an elected judiciary promulgated ethical rules prohibiting candidates from announcing their

views on disputed legal and political issues. *See* Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 85 (1990). In 1990, when the ABA revised its Model Code, it adopted a different formulation of the candidate speech restriction, but [*880] one that continues to restrict more speech than the pledges-and-promises provision. Model Canon 5 restrains candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Jud. Conduct Canon 5(A)(3)(d)(ii) (1990). A number of States have revised their rules in accordance with the 1990 "commitment" canon.[21] Today, most States with an elected judiciary have campaign speech restrictions patterned after either the 1972 or 1990 ABA model canons.[22]

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[21] *See, e.g.*, Ariz. Sup. Ct. R. 81, Canon 5(B)(1)(d)(ii); Ark. Code of Jud. Conduct Canon 5A(3)(d)(ii); Cal. Code of Jud. Ethics Canon 5(B); Fla. Code of Jud. Conduct Canon 7(A)(3)(d)(ii); Ga. Code of Jud. Conduct Canon 7(B)(1)(c); Ill. Sup. Ct. R. 67, Canon 7(A)(3)(d)(i); Kan. Sup. Ct. R. 601A, Canon 5(A)(3)(d)(ii); Ky. Sup. Ct. R. 4.300, Canon 5(B)(1)(c); La. Code of Jud. Conduct Canon 7(B)(1)(d)(ii); N.Y. Code of Jud. Conduct Canon 5(A)(4)(d)(ii); Ohio Code of Jud. Conduct Canon 7(B)(2)(d); S.D. Stat., ch. 16-2, app., Canon 5(A)(3)(d)(ii); Tenn. Sup. Ct. R. 10, Canon 5(A)(3)(d)(ii); Wash. Code of Jud. Conduct Canon 7(B)(1)(c)(ii).

[22] A few States proscribe only improper campaign pledges and promises. *See, e.g.*, Or. Code of Jud. Conduct JR 4-102(B); Utah Code of Jud. Conduct Canon 5(C)(1). Other States impose different, yet significant speech restrictions. *See, e.g.*, Tex. Code of Jud. Conduct Canon 5(2)(i) (no "indicating an opinion on any issue that may be subject to judicial interpretation by the [judge/candidate if elected into office], except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case"); Wis. Sup. Ct. R. 60.06(3) (prohibiting "suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power"); *see also* Ala. Canons of Jud. Ethics Canon 7(B)(1)(c) (candidate "shall not announce in advance the candidate's conclusions of law on pending

(continued...)

Minnesota Supreme Court decisions such as *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (Minn. 1939), and *Peterson v. Stafford*, 490 N.W.2d 418 (Minn. 1992), also provide insight into factors that would have informed the court's decision to adopt the announce clause. As we have discussed, in both cases Minnesota justices commented on historical problems resulting from close proximity between judicial elections and partisan politics. It is reasonable to infer that the prohibition on candidates announcing their views on disputed issues was intended in part to prevent judicial campaigns from becoming routine political contests, thereby jeopardizing the independence and integrity of the State's judiciary. This inference is corroborated by evidence showing that the Minnesota Bar Association, District Judges Association, and the Conference of Chief Judges recently recommended against the adoption of the less-restrictive 1990 ABA commitment canon because of concerns that liberalizing Canon 5's speech restrictions would politicize judicial elections.

The plaintiffs have offered no contradictory evidence which might increase the need for a more extensive showing by the State. *See Shrink Mo.*, 120 S. Ct. at 906. Wersal argues that the Lawyers Board's refusal to enforce the announce clause calls into question the Boards' attempt to demonstrate that the clause serves compelling state interests. That the Director of the Lawyers Board stated she would not prosecute violations under the clause as a matter of prosecutorial discretion until it was upheld by a court is not sufficient to increase the evidentiary burden. The Lawyers Board's determination was based on [*881] the likelihood of a constitutional challenge to the

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[22] (...continued)
litigation"); Colo. Code of Jud. Conduct Canon 7(B)(1)(c) (candidate may not "announce how the judge would rule on any case or issue that might come before the judge").

announce clause and the limited resources available to the Board for defending such a suit; it has little bearing on whether certain campaign announcements can impair or be perceived to impair judicial independence and impartiality.

The Lawyers and Judicial Boards have shown that this restriction furthers compelling governmental interests in the independence and actual and perceived impartiality of the judiciary.

B.

Having concluded the restriction furthers compelling interests, we must examine whether it is narrowly tailored. *See California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 2414, 147 L. Ed. 2d 502 (2000); *Brown*, 456 U.S. at 54.

The district court construed the announce clause to apply only to discussion of a candidate's predisposition on issues likely to come before the candidate if elected into office. *Republican Party v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999). None of the plaintiffs claimed in their opening briefs on appeal that the district court erred by interpreting the language as it did. Wersal attempts to raise the issue in his reply brief. It is well established that issues not argued in an opening brief cannot be raised for the first time in a reply brief,[23] and we will therefore analyze the announce clause as it has been construed by the district court. We should add, however, that if the issue were properly before us, we would not find error in the district

[23]*See, e.g., United States v. Vincent*, 167 F.3d 428, 432 (8th Cir. 1999), *cert. denied*, 528 U.S. 848, 120 S. Ct. 124, 145 L. Ed. 2d 105 (1999); *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998); *United States v. Davis*, 52 F.3d 781, 783 (8th Cir. 1995); *French v. Beard*, 993 F.2d 160, 161 (8th Cir. 1993); *see also United States v. Darden*, 70 F.3d 1507, 1549 n. 18 (8th Cir. 1995) ("Absent some reason for failing to [raise issue in opening brief], we will not consider an issue first raised in a reply brief.").

court's interpretation. The longstanding principle that courts should construe laws to sustain their constitutionality, *see, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988), the Minnesota Supreme Court's adherence to this interpretive principle, *see In re R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991), *rev'd on other grounds by R.A.V. v. City of St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992), and the Judicial Board's endorsement of the narrowed construction form a solid foundation for the district court's conclusion. Furthermore, the interpretation accords with Stretton, where the Third Circuit interpreted identical language similarly. 944 F.2d at 144.[24]

As construed by the district court, the restriction prohibits candidates only from publicly making known how they would [*882] decide issues likely to come before them as judges. A similar construction was determined to be narrowly drawn in *Stretton*, 944 F.2d at 144, and we are persuaded that it is narrowly drawn here as well. These sorts of campaign announcements are (or can appear to be) calculated to show that the candidate will decide cases in a certain way if elected into office, and the implication that the candidate will carry through

[24]In claiming error, Wersal relies heavily on *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229-30 (7th Cir. 1993) where the Seventh Circuit declined to read an analogous canon narrowly. Having carefully studied both *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991), and *Buckley*, we believe that *Stretton* is more persuasive. *Buckley* gives little heed to "our task [as courts] to construe [laws] so as to comport with constitutional limitations" if consistent with the will of the lawmaker. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973). *Buckley* also distinguished Stretton in part due to factors not present in this case or in *Stretton*: a disciplinary body's determination that a judge violated the clause when he commented truthfully on his past record and counsel's convoluted arguments that the announce clause contained an implied "right of reply." 997 F.2d at 229.

with his campaign announcements can haunt the candidate on the bench to the detriment of the State's judicial system. *See id. But see Buckley*, 997 F.2d at 229 (questioning whether limiting construction would significantly circumscribe scope of announce clause, giving example of civil war in Yugoslavia as likely to come before courts as persecution defense to deportation).

Wersal has stated that the restriction prohibits candidates from discussing virtually every topic related to their campaigns, and the dissent maintains that it effectively bans all campaigning. But nothing in Canon 5(A)(3)(d)(i) restricts candidates from discussing or publicizing information about their character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits, and abilities, which are subjects the Minnesota General Assembly has determined to be highly relevant to a candidate's qualification for office. *See* Minn. Stat. § 480B. 01, subd. 8 (listing criteria by which commission on judicial selection shall evaluate persons applying for judicial vacancies to be filled by gubernatorial appointment). The Minnesota Supreme Court has also indicated that candidates may discuss and state their views on how they would handle administrative duties if elected. *See Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979) (no ethical violation under Canon 7(B), the precursor to Canon 5(A), when candidate made cutting costs of courtroom administration part of campaign platform); *cf. Ackerson v. Kentucky Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309, 314 (W. D. Ky. 1991) (restraint on campaign speech about court administration would violate First Amendment).

We further believe the Minnesota Supreme Court would conclude that general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause. In 1990 the Judicial Board issued an advisory opinion, which the Board has since made known to judicial candidates by

letter, stating that Canon 5 does not prohibit candidates from discussing appellate court decisions. *See* Minnesota Bd. on Judicial Standards, Informal Op. 10/10/1990. The Judicial Board has also approved extensive lists of sample questions that interested voters could pose to judicial candidates consistent with Canon 5. These questions are wide-ranging and include such topics as a candidate's judicial philosophy, issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's perception of a judge's role in the judicial system.

While it is true that some judicial ethics advisory bodies in other States have interpreted language identical to the announce clause to reach topics such as these, *see, e.g., Berger v. Supreme Court*, 598 F. Supp. 69, 74 (S. D. Ohio 1984) (disciplinary counsel's position that truthful criticisms of judicial administration and incumbents prohibited); *see generally*, Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 86-87 (1990) (collecting advisory opinions stating that discussion of court administration, court rules, criminal sentencing, judicial philosophy, published court decisions, etc. were improper), we believe the Minnesota Supreme Court would view the matter consistently with [*883] the Judicial Board. The Judicial Board has been intimately involved with the process of amending the Code over the years, and its views are likely to reflect those of the Minnesota Supreme Court. As the Third Circuit in *Stretton* put it, "we would be naive not to recognize that the [Judicial Board's] position is, at the very least, a straw in the wind indicating the direction that [the supreme] court will go." *Stretton*, 944 F.2d at 143. Furthermore, some of the advisory opinions of other States' ethics boards conflict with the Minnesota Supreme Court's decision in *Bundlie* on whether the announce clause prohibits announcements about judicial administration.

Wersal cites several decisions in which courts have struck down similar canons as overly broad restrictions on speech. *E.g.*, *Buckley*, 997 F.2d at 228-29; *Beshear v. Butt*, 863 F. Supp. 913, 917-18 (E. D. Ark. 1994); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1097 (N. D. Fla. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky. 1990). However, these cases proceed on the assumption that judicial candidates are left with little to discuss and to put before the voters other than their "name, rank, and serial number," *Buckley*, 997 F.2d at 227, "biographical data," *ACLU v. Florida Bar*, 744 F. Supp. at 1098, or "professional history," *J.C.J. D.*, 803 S.W.2d at 956, and are therefore distinguishable.

The announce clause, as construed by the district court, is narrowly tailored to further compelling governmental interests.

VI.

Wersal contends that Canon 5(B)(2),[25] which prohibits judicial candidates from personally soliciting campaign funds,

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[25]In full, Canon 5(B)(2) provides:

> A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

violates the First Amendment because it is not narrowly tailored.

We have no difficulty in concluding that Canon 5(B)(2) is necessary to serve compelling state interests. Indeed, Wersal does not dispute these points. Raising campaign funds, a practical requirement for judicial candidates who face popular election, has been identified as presenting "the greatest of all conflicts" between necessity and judicial impartiality. *See* E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 98 (ABA 1973). Judges, more than officeholders in other branches of government, risk the appearance that those who contribute to their campaigns can impermissibly influence governmental processes. When judges obtain funds from a group that has an interest in the outcome of litigation, such as the plaintiffs' or defendants' bar, judges can appear beholden to that group for their accession to office, creating the expectation that the judges will favor their benefactors accordingly. *See In re Fadeley*, 310 Ore. 548, 802 P.2d 31, 40 (Or. [*884] 1990) ("A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so."); *cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897, 905-06, 145 L. Ed. 2d 886 (2000) (public perception that large donors can "call the tune" for candidates can harm democratic processes); *Buckley v. Valeo*, 424 U.S. 1, 27, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam). Even if judges receive contributions from a broad cross-section of persons and interests, the appearance of impropriety hangs over them if they adjudicate cases in which a litigant or counsel has contributed, or refused to contribute, to their campaign. *See Stretton*, 944 F.2d at 145 (noting the unseemliness of judges presiding over cases in which lawyers have helped fund judicial campaign chests).

Recognizing the unique difficulties presented by judicial campaign fundraising, Canon 5(B)(2) seeks to insulate judicial candidates from the solicitation and receipt of funds while

leaving open ample alternative means for candidates to raise the resources necessary to run their campaigns. To this end, Canon 5(B)(2) provides that candidates may establish campaign committees to conduct fundraising on their behalf. The Code does not limit the amount individuals can contribute to the candidate's campaign fund or the amount the campaign committee may raise. Canon 5(B)(2) imposes only two restrictions related to campaign finance on the committee: its members cannot disclose to the candidate the identity of contributors or those who were solicited to contribute but declined, and they cannot permit the campaign funds to be used for private benefit.

Wersal's objection to this fundraising arrangement is limited: He does not challenge the campaign committee setup or the restrictions placed on the committee's members. Rather, he suggests that a narrowly tailored rule would allow candidates to solicit funds from large groups and to send out letters over their signatures requesting money. He argues that the State's concern over the corrupting influence of money on judicial candidates is fully redressed by the provision that prevents the campaign committee from revealing the identity of campaign contributors.

Wersal is correct that the knowledge-screening provision of Canon 5(B)(2) lessens several of the problems attendant on judicial campaign fundraising; we reject his conclusion, however, that it obviates the need for limitations on candidates soliciting funds from groups personally or by letter. When a judicial candidate seeks funds directly from those who stand to gain from the candidate's decisions in office, the State may conclude that his activity is incongruous with the decorum of judicial office whether or not the candidate is shielded from knowing who ultimately contributed. Particularly when candidates target groups who have pecuniary or ideological interests in litigation likely to come before the court, the mere act of solicitation can contribute to the appearance, accurate or

not, that "justice is for sale" and the expectation of impermissible favoritism. *See Fadeley*, 802 P.2d at 40.

Wersal makes a secondary argument that when Canon 5(B)(2) deprives him of the opportunity to solicit funds from large groups or by mail it prevents him from running an effective campaign. The Supreme Court has said that restrictions on campaign financing must leave candidates with the ability to accumulate sufficient resources for effective advocacy. *Shrink Mo.*, 120 S. Ct. at 908-09; *Buckley*, 424 U.S. at 21. Citing the impracticability of his being accompanied by a campaign committee member who could [*885] "utter the magic words" to solicit funds, Wersal argues his statewide campaign efforts were frustrated. However, no provision in the Code specifies that members of a campaign committee must request contributions in person. Canon 5(B)(2) expressly permits committees to conduct campaigns through mailings, brochures, and advertisements. Wersal has not alleged that these alternatives are ineffective fundraising mechanisms. Accordingly, he has not demonstrated that Canon 5's restrictions stifled his campaign efforts. *See also Shrink Mo.*, 120 S. Ct. at 909 ("a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*").

In a separate argument, the Party asserts that Canon 5(B)(2) is not narrowly tailored as applied to third parties. Much of this argument is based on a misreading of a Code section we have already clarified. Canon 5(A)(3)(c), which states that candidates "shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing," is violated only when persons act as agents of the candidate. As a result, no ethical violations occur if third parties solicit or expend funds independently of Wersal and his campaign committee.

The district court did not err in determining that this restriction is narrowly tailored to further compelling state interests.

VII.

The judgment of the district court is affirmed.

BEAM, Circuit Judge, dissenting.

At the outset, I admit that, insofar as I have been able to discern, Minnesota has a judicial system peopled with individuals of intellect, integrity and character, fully capable of making difficult decisions, consistent with the interests of the people of the state. However, such a condition is beside the point because many other states have achieved the same essential goals without trenching upon clearly established constitutional rights. The court today holds that laws prohibiting candidates for public office from voicing their views as to issues pertinent to their conduct in office, or their opponent's conduct in office, or from appearing or speaking to like-minded citizens, are not only permissible but are apparently necessary to a well-ordered democracy. Because in my view such a result flatly contradicts the edicts of the First Amendment, I respectfully dissent.

The court and I part ways in three critical respects. First, the court misconstrues Minnesota law, reading it with such latitude as to contradict one-hundred fifty years of development in Minnesota's judicial selection processes. Second, the court supplants constitutionally guaranteed rights with its own notions of preferred judicial policy. Finally, the court countenances restrictions on fundamental, protected activity that are neither necessary nor narrowly tailored. In the final analysis, the court sustains a set of restrictions which probably have no practical effects other than to quash election-related speech and

association, and thus undermine a democratic process-precisely the fear that prompted the drafting of the First Amendment.

I.

Prior to even contemplating the suppression of otherwise protected First Amendment activity, a state must assert a compelling interest. Presumably, that interest must reflect a state's actual and [*886] lawfully adopted policy. The court accepts as "undeniably compelling" appellees assertion that in effecting Canon 5, the Minnesota Supreme Court furthered Minnesota's interest in maintaining the "independence" of its judiciary. *Ante* at [21a]. Certainly, all states share such an interest generally—such is the preferred state of the American judiciary.[26] But different sovereigns give different meanings to the term "independence." I believe the court has misconstrued Minnesota precedent, and in doing so has used it to justify a

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[26]The court distorts my views on judicial independence, implying, *ante* at [21a], that I would sacrifice such independence, and, presumably, its alleged by-product, "justice under law," on an altar of "democratic self-government." (I assume the court is referring to my concern for the democratic election process.) The court's statements are seriously at variance with my views and my arguments in dissent. This case is not about rules under which a neutral judiciary dispenses justice under canons of ethics designed to support judicial independence, *once the selection process is over*. I wholly agree that such a system should exist and be designed to enhance, through reasonable state regulation, the ideals of judicial independence. This case is about the point at which free speech and association collide directly with an attempt by the Minnesota Supreme Court to manage (and I believe over manage) the election process in the name of judicial independence of some definition.

My dissent simply and appropriately recognizes and discusses these competing interests and reaches a result in line with the Constitution and Supreme Court precedent. It is the court that insists that "one of the principles should give way completely to the other," that is, judicial independence, whatever that proves to be under the court's analysis, should trump the First Amendment when the election of a *judge* is at stake. There is absolutely no support in federal law for the court's position.

policy prescription that lacks support in Minnesota's constitutionally established public regimen.

The court, without further analysis, simply accepts appellees' claim that Minnesota has "historically pursued the ideal of an independent judiciary." *Ante* at [22a]. It relies heavily on the Minnesota Supreme Court's observation in *Peterson v. Stafford*, 490 N.W.2d 418 (Minn. 1992), that while the federal and its own system differ, they both "create and maintain an independent judiciary as free from political, economic and social pressure as possible." *Id.* at 420. In this, the court finds license to sustain as consistent with Minnesota public policy anything which it considers to enhance judicial independence. But this latter term is subject to broad and varied interpretations, and merely begs the question "independent from what?" While appointed judges are "independent" from the electorate, elected judges, once elected, are hardly "dependent" on the electors, and are "independent" from other elected officials. However, we are not called upon to sustain our own notions of "independence," but Minnesota's. We must therefore read the Minnesota Supreme Court's statement in *Peterson* in light of that state's public policy as prescribed by its citizens. As it turns out, Minnesotans have consistently rejected all attempts to narrow or curtail their elective franchise when it comes to selecting judges. Rather, they have repeatedly strengthened popular control over their judiciary.

The debate whether to appoint, retain or directly elect judges predates Minnesota's founding. The federal drafters debated it in Philadelphia. *See The Anti-Federalist Papers & the Constitutional Convention Debates* 120-27 (Ralph Ketcham ed., Mentor 1986). Alexander Hamilton defended their subsequent choice in print, arguing that elected judges would suffer "too great a disposition to consult popularity to justify a reliance that nothing would be consulted [*887] but the Constitution and the laws." *The Federalist No. 78*, at 471 (Clinton Rossiter ed. 1961).

Anti-Federalists hotly contested that position. Brutus counseled trepidation at the advent of a judiciary "altogether unprecedented in a free country" which was to be "rendered totally independent, both of the people and the legislature." Brutus XI, Letter of January 31, 1788, in Ketcham, *ante*, at 293. *See also*, George Mason, *Speech in Opposition to the Constitution*, and Patrick Henry, *Speech to the Virginia Ratifying Convention*, both in Ketcham, *ante*, at 174, 212 (arguing that the federal judiciary made the courts too far removed from the citizenry).

The federal founders ultimately decided upon lifetime appointments, subject to good behavior, placing us (ostensibly) beyond the cavil of partisan activity and populist suasion. U.S. Const. art. III. As federal judges, we understandably have a bias for this method. Yet, we should not confuse the rationale behind our federal system with some universal judicial *raison d'etre*, for different sovereigns value different policies. Some elect only a few officers and rely largely on appointments, while others insist on electing virtually every office-holder. Since Hamilton and Brutus debated, the arguments on each side have been well known, and were so at Minnesota's founding.

Minnesota's first judiciary arrived under the auspices of the United States with the Northwest Ordinance of 1787, which provided the Northwest Territories with congressionally-appointed judges and governor-appointed local magistrates. Northwest Ordinance § § 4, 7 (1787); *see generally*, Hiram F. Stevens, *History of the Bench & Bar of Minn.* (1904). In 1849, Congress created the Territory of Minnesota and provided a similarly appointed judiciary. Act of Congress, March 3, 1849 § § 2, 9, 11, 9 Stat. 403. Minnesotans did not warm to these arrangements. As one state founder noted, "it has been the complaint of the Territory . . . that we have to submit to have our Judges sent to us and have no voice in the selection . . . and [the people] have looked forward with hope to the time when they could elect their own men." *The Debates & Proceedings of*

the Minn. Constitutional Convention 495 (1857) ("*Democratic Debates & Proceedings*"). That chance came in 1857 when Congress authorized Minnesotans to draw up a constitution. Act of Congress, Feb. 26, 1857, 11 Stat. 166.

Minnesota chose an interesting time to seek statehood. With the Civil War three years off, and the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 691 (1856), one year past, any prospective new state necessarily stood in the eye of a hurricane.[27] Against this backdrop, on June 1, 1857, Minnesotans elected delegates to a constitutional convention. One historian gave the following description. "The feeling between and within political parties was bitter. Republicans were not just Republicans but 'Black Republicans' and 'Nigger Lovers. 'The Democrats were divided into 'Regular' and 'Moccasin' Democrats, but were united for convention purposes." Julius E. Haycraft, *Territorial Existence & Constitutional Statehood of Minnesota* (1946), republished in 1 Minn. Stat. Ann. 145, 151; *see generally*, William Anderson, *A History of the Constitution of Minnesota* (1921). Moreover, "so intense was the feeling [*888] that the Republicans and Democrats would not meet in the same convention. The result was two conventions; delegates of each party held separate sessions in different rooms in the old capitol." Haycraft, *ante*, at 151. The two bodies met separately, largely without consultation. Even after a conference committee produced a compromise document, each convention refused to sign a document soiled by the other's signatures, so each separately signed largely identical documents. *Id.* at 151-52.

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[27] Abolitionist sentiment ran high in Minnesota and, while not reaching the levels in other states, did result in some violence. Interestingly, among the slaves brought to Minnesota during the pre-civil war period was Dred Scott, who from 1835-40 lived with his "owner," Surgeon J. Emerson, at Fort Snelling. Stevens, *ante*, at 30-36.

The records of these proceedings demonstrate that Minnesota's founders grappled with precisely the same contours as their federal forebears. The Republicans steadfastly insisted on an elected judiciary, but did debate the form of those elections. *Debates & Proceedings of the Constitutional Convention for the Territory of Minn.* 334-35, 402 (1858) ("*Republican Debates & Proceedings*"). The question of politics arose when a Mr. Galbraith proposed an amendment requiring that judicial elections never be held on the same day as an election for any other office. He reasoned that "the excitements of mere political and party issues should be kept as far as possible from the election of the judges—that the people should elect the Judges, upon their merits as judges—that they should be elected with the view of making them as independent of political parties as possible." *Id.* at 406. In opposition, a Mr. Lowe argued, "I do not believe it will be possible to separate the election of judges from political considerations." *Id.* The convention rejected Galbraith's amendment, and opted for concurrent judicial elections.

The Democratic convention proved far more contentious. After a committee failed to agree on a judicial selection method, the issue came to the convention floor. *Democratic Debates & Proceedings*, *ante*, at 493-509. Those favoring the Hamiltonian appointment model did so for two reasons, fear of populism and fear of political entanglement.

First, they feared the populism that might result from an elected judiciary. One vigorous opponent, a Mr. Setzer, argued:

> The great object of an appointed Judiciary, is to secure stability upon the part of the government, by having a power within the State conservative enough to restrain the waves of popular excitement, when they sweep over us as they have done in different States for years past. . . . Judges represent no constituency and are

> elected by no constituency. They represent nothing except the abstract ideas of equity and justice.

Id. at 495-96. The "abstract ideas of equity and justice" heralded were those set out in *Dred Scott*—the culmination of the grand experiment that seventy years earlier Brutus had observed was "altogether unprecedented in a free country." And the "waves of popular excitement" that so rankled delegates were the popular sentiments of radical abolitionist fervor. He continued, "we see it in Wisconsin, in Iowa, and in all those States where popular excitement in reference to negro-worship and disunion has had its effect upon an elective Judiciary." *Id.*

Minnesota's founding debate did not turn entirely on slavery. Those opposed to an elected judiciary also raised precisely the same, eminently sensible concerns troubling the court today. Another delegate, a Mr. Meeker, argued:

> I contend that the Judges who are elected, are elected by parties, and are the mere fuglemen of caucuses. The best trickster or the best manager of caucuses is just as likely to be the nominee of a party as the most learned man in the nation. . . . The greatest curse that [*889] could befal [sic] any people would be the establishment of a political court . . . . And our Judges . . . if they are to be elected, must necessarily be essentially political Judges; they cannot be anything else.

Id. at 500. They feared the instability such a system would create. "Whichever party is in the ascendancy will change the system of jurisprudence to its own standard, and there will be no security, no stability in anything." *Id.* at 501. Accor[illegible]gly, a Mr. Sherburne recommended adopting the venerable appointment mechanisms common along the east coast. *Id.* at 497.

The prevailing delegates, those favoring judicial elections, met these arguments head-on. Said a Mr. Emmett:

> We hear a great deal of talk about an independent Judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people . . . ? I say then that in order to correct the errors of Judges—and it may be important to correct them,—the office should be made elective.

Id. at 503. And as regards the fear that politics would infect an elected system, he continued, "if the people are incapable of selecting their Judges, they are also incapable of selecting the man who is to appoint the Judges . . . . The governor always selects men belonging to his own political party, while the people often select them regardless of parties." *Id.* A Mr. Curtis responded to Mr. Sherburne: "Is a sufficient argument in favor of an appointed Judiciary, that it is old? Is it all that can be said in its favor, that it has grown hoary by age and usurpation—because it is all covered over from one end to the other by corruption and fraud?" *Id.* at 498.

As these exchanges demonstrate, the arguments surrounding election and appointment were well known and well met. Despite the concerns raised then and marshaled again by the court today, Minnesotans of both parties opted for an elected judiciary. Ultimately, they more feared the potential politics of an appointed bench and saw popular election as the proper remedy. Given the political climate, they desired more control over their judiciary. ***That was the policy adopted by the people of Minnesota.***

Minnesota's electorate has never since intimated a change in this policy. Indeed, it has frequently reaffirmed judicial accountability to the electorate.[28] In 1912, for in

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[28]Minnesota courts have consistently struck down rules depriving (continued...)

stance, the legislature required judicial candidates to run on a non-partisan ballot. *Peterson*, 490 N.W.2d at 420. That statute in no way restricted a candidate's political activities or ability to educate the voters as to his merits, opinions or values. *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579, 580-81 (Minn. 1939). The reform's objective was to ensure that candidates were elected on their own merits. [288 N.W.] at 580. A merit-based election necessitates the flow of information regarding candidates to the electorate.

Minnesota has four times rejected the so-called Missouri Plan, whereby the governor could fill vacancies by non-partisan appointment, and such appointees would later be subject only to a retention vote. Maynard E. Pirsig, *The Proposed Amendment of the Judiciary Article of the Minn. Constitution*, 40 Minn. L. Rev. 815, 815-19 [*890] (1955-56); *Peterson*, 490 N.W.2d at 421 n. 14. Again, voters retained their system of direct electoral control.

In 1948, a commission recommended that candidates run against a specific incumbent rather than against the field. *Peterson*, 490 N.W.2d at 421 n. 14. It argued, "where several incumbents are running for re-election, each should stand or fall on the basis of his own record. The present system does not permit this since opposing candidates run against the field." *Report of the Constitutional Comm'n of Minn.* 43-44 (Oct. 1, 1948). Minnesota law was amended accordingly. *See* 14A Minn. Stat. Ann. § 204B. 06; *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (Minn. 1950) (sustaining requirement that judicial

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[28](...continued)
judicial offices of their elective nature. *See State ex rel La Jesse v. Meisinger*, 258 Minn. 297, 103 N.W.2d 864, 866 (Minn. 1960); *State ex rel Smallwood v. Windom*, 131 Minn. 401, 155 N.W. 629, 633 (Minn. 1915); *State ex rel Rosckes v. Dreger*, 97 Minn. 221, 106 N.W. 904, 906 (Minn. 1906); *State ex rel Jordan v. Bailey*, 37 Minn. 174, 33 N.W. 778, 779 (Minn. 1887).

candidates declare which specific seat is sought). Such seat-specific elections increase the electorate's focus on a specific judge's conduct.

Thus, since first permitted to select its own judiciary, Minnesota has consistently favored electorally-responsive judges. Its citizens have considered and rejected the court's policy concerns,[29] and have rejected appointment and retention systems that would have curtailed or eliminated popular control. Minnesota has repeatedly affirmed its citizens' right to elect their judges, and has bolstered that franchise with laws enhancing merit-based elections and furthering the flow of information regarding the candidates to the electorate.[30] Canon

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[29]Indeed, the Minnesota Supreme Court specifically refused to resurrect the policy debates undergone at the constitutional convention.

> There are many arguments, on grounds of both principle and expediency, against the election of judges, either in special cases or generally. Such arguments do not enter into our consideration. The fundamental law of this state is, and always has been, that the selection of judges must be submitted to the electors.

La Jesse, 103 N.W.2d at 866.

[30]The court attempts to divorce my review of Minnesota judiciary history from that undertaken by the Minnesota Supreme Court in *Peterson*, and paints the latter as justifying its conclusion today. *Ante* at [25a] n. 13. But the review undertaken in *Peterson* supported a regulation wholly different from that before us today. In *Peterson*, the Minnesota Supreme Court reconciled Minnesota history with a measure requiring the judicial election ballot to designate incumbent jurists as such. 490 N.W.2d at 424. The Minnesota Court found that initiative consistent with Minnesota history and sustained it because it *enhanced* the flow of information to Minnesota voters, which stands in stark contrast to the measure before us today which *suppresses* that same flow of information. Rather than address what the Minnesota Supreme Court meant by "independent" in the proper context, the court simply transports the Minnesota court's purposely cabined conclusions into today's opinion. But as my review, and that undertaken in *Peterson* indicate, in the context of Minnesota public policy, an "independent

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5 subverts this policy. The suppression of election-related speech and association does not enhance the franchise. In fact, it militates against the public's ability to elect judges based on their merits by denying citizens a reasonable vehicle for self-information. The court assures that candidates may still discuss their "character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits and abilities." *Ante* at [54a]. However, these are simply not all of the qualities that piqued the interest of Minnesota's founders, nor those which fully inform voters who are charged with the selection of Minnesota's judiciary. [*891]

The question here is whether Minnesota has expressed a sufficiently fundamental policy interest in "independent" judicial elections to even warrant our proceeding to the next stage of our constitutional inquiry. Certainly, in *Peterson*, the Minnesota Supreme Court instructed us that Minnesota has an interest in making its judiciary as independent "as possible." 490 N.W.2d at 420. But as the Minnesota Supreme Court cannot trump its citizens' prescribed policy, "as possible" cannot be read to include restrictions which curtail the elective franchise. Because Canon 5 does precisely that, I believe the court has clearly misapplied Minnesota law.

II.

The preceding discussion may prove largely academic, because the restrictions at issue in this case were not enacted by the Minnesota legislature but rather were created by the Minnesota Supreme Court itself. While that court has not yet

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judiciary" means judges elected by well-informed, independent voters. In undermining that process by stifling the free flow of information, the court merely exacerbates the partial transfer of the Minnesota judicial selection machinery into the hands of other narrow political influences as noted elsewhere in this dissent.

ruled that its own regulations comport with fundamental state policy, it could just as easily do so. And as a federal court, we defer to state courts on questions of state law. Indeed, we wade into such questions only in the most dire of circumstances, for instance where state law is being intentionally tortured to discriminate against a protected minority, *see, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964), or where an error of state law works a singular national impact, *see, e.g., Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). But while we ought not inject ourselves into the state law question, we are charged with enforcing federal law. Federal law, and in particular the Constitution, operate to protect the rights of citizens against encroachment by both federal and state governments. In my view, even accepting arguendo that the people of Minnesota did actually intend to immunize their judicial candidates from some of the rigors of an election campaign, Canon 5 still flatly contradicts controlling precedent and violates the Constitution.

The court repeatedly emphasizes the importance of judicial independence, a proposition with which I heartily agree. Judicial independence is of the utmost importance to a fair and well-functioning judicial system. Moreover, I agree that a state has an interest not only in warding off an actual breakdown of that independence, but also the appearance of such. Every court to address this or a similar question has recognized the importance of this principle. Moreover, all have recognized, again rightly so, that by virtue of their function, judges fundamentally differ from other elected officials. The court cites extensively to these authorities. Yet the court omits noting that almost all of these courts have then further recognized that such policy notions cannot trump constitutionally-enshrined rights.[31] The

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[31]*See e.g., Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (striking (continued...)

Constitution makes strict demands. Often [*892] times, important and justifiable public policy goals must bow before its restraints. As judges, we must put aside our inclinations as jurists, lawyers, residents, citizens, and parents, and enforce the Constitution's restraints. The Constitution protects the most basic elements of our democratic processes, in particular the rights of candidates and citizens to express and receive views pertinent to public office, and to associate in the election context with others of their own choosing. Because Canon 5 sharply curtails, if not outright bans these activities, regardless of how laudable its purpose, it must be struck down.

Because election speech and association lie at the heart of the First Amendment, any restriction thereof must survive strict scrutiny. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989). A restriction on otherwise protected activity must be necessary and narrowly tailored to serve a compelling state interest. *Id.* at 222. "It is the rare case in which . . . a law survives strict scrutiny," *Burson v. Freeman*, 504 U.S. 191, 211, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992), yet the court today, with little reservation, affirms a set of restrictions more sweeping in

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[31](...continued)
down restrictions on judicial campaign spending); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993) (striking down "announce" clause); *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137 (3d Cir. 1991) (narrowing construction of "announce clause"); *Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N. D. Ga. 2000) (striking down canon restricting advertising and election speech); *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224 (M. D. Ala. 2000) (restraining enforcement of campaign advertisement and conduct restrictions); *ACLU of Florida v. The Florida Bar*, 744 F. Supp. 1094 (N. D. Fla 1990) (enjoining "announce" canon); *In re Chmura*, 461 Mich. 517, 608 N.W.2d 31 (Mich.) (narrowing canon to prohibit only knowingly false statements), *cert. denied*, 148 L. Ed. 2d 40, 121 S. Ct. 77 (2000); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991) (striking down "announce" and other campaign restrictions).

scope and effect than ever adopted elsewhere. I discuss in turn, the First Amendment rights implicated by the court's decision, the court's purported interests and the need for and tailoring of the challenged restrictions.

A.

The Supreme Court has consistently afforded election speech and association the highest protection. "The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy-the political campaign." *Brown v. Hartlage*, 456 U.S. 45, 53, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982). Few, if any, state interests prove sufficiently compelling to trump these activities. While "a state has a legitimate interest in upholding the integrity of their electoral process . . . , when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated." *Id.* at 52. Canon 5 runs roughshod over the clearly established speech and associational rights of candidates, political parties and the voting public. That alone should foreclose any thought of Canon 5's constitutionality.

Candidates for public office enjoy both speech and associational rights.

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley v. Valeo, 424 U.S. 1, 52-53, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (emphasis added). To that end, the First Amendment protects the right to campaign and restricts states to preventing only actual fraud and corruption.[32] *Brown*, 456 U.S. at 55. [*893]

Candidates similarly enjoy protected association rights. These interpose themselves "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216, 93 L. Ed. 2d 514, 107 S. Ct. 544 (1986). A candidate's association with a political party, organization or another candidate provides a basic means of election communication. Associational rights work hand in hand with a candidate's speech rights, for without the former, the latter may prove meaningless. "'The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.'" *Id.* at 214 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57, 38 L. Ed. 2d 260, 94 S. Ct. 303 (1973)).

The First Amendment protects not only speakers' rights, but also those of listeners. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976). A campaign implicates not only the candidate's right to self-expression, but also voters' rights to receive the candidate's message. A state may not

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[32]The court cites *Burson* where the Supreme Court sustained the prohibition of "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place." 504 U.S. at 193. While not a traditional "time, place, and manner" restriction in that it was content-specific, the rule curtailed speech only within that 100-foot bubble. *Id.* at 197. Against a vast history of election fraud and intimidation at polling places, the Court permitted only an extremely narrow, location-specific restriction on campaign speech. *Burson* hardly supports the absolute bans imposed by Canon 5.

"hamstring[] voters seeking to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223. Nor may a state limit public debate as "it is simply not the function of government to 'select which issues are worth discussing or debating.'" *Brown*, 456 U.S. at 60 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972)); *accord United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). In short, "[a] state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu*, 489 U.S. at 228 (quotation omitted).

Voters' associational rights parallel their right to receive information. "To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220.

A party's speech and association also receive protection, particularly in the election context. *Eu*, 489 U.S. at 224; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). In endorsing or inviting a candidate to speak, a party "reflects its members' views about the philosophical and governmental matters that bind them together [and] seeks to convince others to join those members in a practical democratic task," an election. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615, 135 L. Ed. 2d 795, 116 S. Ct. 2309 (1996) (plurality opinion of Justice Breyer). Limitations on a party's ability to endorse a candidate "hamper[] the ability of a party to spread its message." *Eu*, 489 U.S. at 223. "[A] political party has a right to . . . select a standard bearer who best represents the party's ideologies and preferences." *Id.* at 224 (citations and quotations omitted). The

suppression of a party's right to associate with candidates of its [*894] choice, renders it powerless.[33] "The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association." *Tashjian*, 479 U.S. at 214.

Canon 5 trenches upon these rights in a variety of ways. The "announce" clause, for instance, effectively bans campaigning itself. The court disagrees, saying "the judicial candidate simply does not have a First Amendment right to promise to abuse his office." *Ante* at [18a]. But the court proves too much. The Supreme Court established in *Brown* that no candidate for any office possesses such a right. "The state may ban such illegal agreements without trenching on any right . . . protected by the First Amendment." 456 U.S. at 55. Beyond prohibiting fraud and corruption, and the appearance of the same, a state may prevent judicial candidates from prejudging or pledging outcomes in specific cases or even in particular types of cases. But beyond such, a state cannot further unreasonably curtail election-related speech.

The announce clause, however, bars discussion of *all* disputed legal and political issues. The court's narrowing construction to "issues likely to come before the candidate," *ante* at [52a], is meaningless. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993) (recognizing the

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[33]The court relies in part on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 137 L. Ed. 2d 589, 117 S. Ct. 1364 (1997), in which the Court sustained a ban on fusion candidates—those appearing on the ballot as representing more than one party. That law governed form of the ballot but did not restrict parties from endorsing the candidate of their choice. This prevented small parties from bootstrapping their way into public election funds by endorsing a major party candidate, and then claiming the resulting votes. As it did not affect candidate or party speech and associational rights, the Court sustained the rule. That case does not support the banning of all election-related discussion and association.

true scope of such a "limitation").[34] Even could such a category be properly cabined, it would still roam far beyond the narrow category of speech left unprotected by the Court in *Brown*. The court assures us, for instance, that a candidate may discuss his "judicial philosophy." *Ante* at [54a]September 10, 2001. I cannot fathom "disputed legal issues" more likely to come before a court than the proper role of stare decisis, narrow or strict construction, original intent and substantive due process. Yet are these not captured by the term "judicial philosophy?" The term is as sweeping as the court's allegedly narrow construction.[35]

Along with the announce clause, the restrictions on attending and speaking at party gatherings, and the bans on seeking or using endorsements, and on self-identifying [*895] as a party member similarly tread upon protected First Amendment rights. Obviously, by banning such activities, Canon 5

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[34]Construing similar language, similarly curtailed, Judge Posner noted:

> There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction. The civil war in Yugoslavia? But we have cases in which Yugoslavs resist deportation to that nation on the ground that they face persecution . . . ; and some years ago the Illinois courts were embroiled in a custody fight involving a child who didn't want to return to the then Soviet Union with his Soviet parents.

Buckley, 997 F.2d at 229.

[35]To truly grasp the impact of today's opinion, one must consider the plight of the judicial candidate who in 2002 must decipher Minnesota ethical obligations. Between them, Canon 5, the district court's opinion and the court's opinion today supply three different versions of acceptable speech. Moreover, all three remain contingent on the Minnesota Supreme Court's agreeing with the court's construction, for if it does not, the judicial candidate may still face sanctions. The threat of chilled speech is too great to countenance.

directly impacts the rights of judicial candidates. The court insists that this impact goes no further, that Canon 5 affects only the rights of candidates, and not those of any third parties. *Ante* at [38a-41a]. But this cannot be, as laws that affect candidates necessarily affect voters. *Bullock v. Carter*, 405 U.S. 134, 143, 31 L. Ed. 2d 92, 92 S. Ct. 849 (1972). The court strives mightily to justify the impact wrought on candidates' rights, arguing for instance that judicial candidates have less interest in certain types of policy debate than do other types of candidates. *Ante* at [17a]. Such arguments do little to justify collateral effects on the rights of others.[36]

Canon 5 affects third parties in a variety of ways. For instance, the announce clause curtails voters' rights to hear a candidate's views on those issues most pertinent to future conduct in office. By preventing candidates from seeking endorsements, Canon 5 potentially prevents voters and parties from gauging a candidate's attitude towards a party, something central to many voters' decision-making processes. Despite the court's protestations, it also de facto curtails a party's ability to endorse the candidate of its choosing. Parties are unlikely to endorse their preferred candidate so long as they fear handing an opponent a potential election issue—specifically, the specter of an ethics violation—even if none exists. This in turn curtails voters' rights to hear parties' views as to candidates. Additionally, by preventing candidates from attending or speaking at party gatherings, Canon 5 trenches upon parties' rights to express themselves in the manner of their own choosing, specifically by presenting the candidate of their choice.

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[36]Of course, the court belies its own contention with the argument, addressed *infra*, that political parties work a unique effect upon the electoral scheme. *Ante* at [36a-37a], [42a-43a]. How the court reconciles its concern with party involvement with its assurances that the rights of candidates alone are affected escapes me.

Our First Amendment rulings usually parse the hypothetical. We worry about "potential" chilled speech, and the supposed ill effects that might flow from quashed association. Presented only with the text of Canon 5, one might well hypothesize that restricting candidates' abilities to express their views and to associate with political parties would lead to two results: higher rates of incumbent retention; and disproportionate campaign fund-raising. This hypothesis follows from a rudimentary understanding of public campaigns and the judiciary.

Campaigns for public office, judicial, legislative or executive, necessarily favor incumbents. Incumbents have better name recognition, better resources, are usually better staffed, and barring some recent disaster, are afforded the presumptions of experience and competence. Of the three branches of government, the judiciary seems to least capture the public's attention. Judicial incumbents, therefore, may enjoy these benefits to an even greater extent.

Unlike most of our First Amendment cases, however, this case need not stick to the hypothetical. Canon 5 has been in effect in Minnesota for some time, in varying forms. We therefore can look to recent elections to see whether these supposed harms have come to pass. Minnesota is no exception to the rule that the public pays the least attention to the judiciary. Indeed, one Minnesota Supreme Court Justice has observed of judicial elections that "it's pretty darn hard to get people to care." *Amendment of Canon 5* [*896] *of the Code of Judicial Conduct: Hearing Before the Minn. Supreme Court* 44 (1997). Election statistics bear this out. In 1996 one-half million voters cast a ballot in the Presidential race yet did not vote in the Supreme Court race. League of Women Voters of Minnesota, *Choosing Minnesota's Judges: An Examination of the Present System and Alternative Proposals* 6 (1998). Moreover, 86% of responding voters said they needed more information

about judicial elections and 77% observed they got less information about judicial than other elections. *Id.*

Fund-raising and other election data demonstrate disturbing distortions in a supposedly democratic process.[37] During the 2000 election cycle, of those judges up for election, only five of sixty-seven trial court benches were contested and only one of four appeals court judges faced a challenger. In 1998, only ten of eighty-nine trial court benches were contested.[38] Judicial fund-raising reflects the same bias. In the 2000 election, the four incumbent Supreme Court justices seeking re-election raised a combined $ 505,070.63. Of their opponents, only two raised sufficient funds to warrant disclosure. These two together raised only $ 23,582.67. Candidate Filings, Minnesota Campaign Finance and Public Disclosure Board (2000). A stable judiciary is, on balance, a laudable pursuit and perhaps Minnesotans have no cause to find fault with any of their judges. But it is just as likely that, at least in part, these imbalances flowfrom a lack of information resulting from the suppression

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[37]Prior to every Supreme Court election, the Minnesota State Bar Association holds a plebiscite between the candidates among its members. The results display in dramatic fashion the extent to which an incumbent may count on support from groups most vested in the judiciary. Since 1974, incumbents have out-polled their challengers by the following margins: 1974: 91 to 9 and 85 to 15; 1978: 77 to 23 and 95 to 5; 1982: 95 to 5; 1992: 61 to 39 and 85 to 15; 1996: 75 to 25 and 90 to 10. Minnesota State Bar Ass'n, *Judicial Elections Task Force Report & Recommendations* 32 Appendix D (1997). While this case has been pending, the 2000 election cycle has come and gone. I occasionally use the most recent data, which post-dates the record on appeal.

[38]These numbers reflect a consistent trend. Since 1980, the number of contested trial benches of those facing election were as follows: 2 of 25; 0 of 25; 5 of 56; 9 of 54; 2 of 67; 4 of 93; 5 of 82; 6 of 42; 14 of 111. Minnesota State Bar Ass'n, *Judicial Elections Task Force Report & Recommendations* 7 (1997).

of election-related speech and association and from other impediments inherent in Canon 5.

Not surprisingly then, in recent history prior to the 1998 election which spawned this suit, only two incumbent judges had lost elections. *See* Mary Ellen Egan, *Judging for Himself*, City Pages 4-5 (June 17, 1998). The record details appellant Wersal's campaign difficulties, hamstrung by both fund-raising and speech limitations. Indeed, an ethics complaint forced him out of the 1996 campaign for fear of losing his law license and being unable to support his family. Another Supreme Court candidate, Michael Demoss, faced a similar problem after making comments about his views on abortion. With challengers unable to create traction by discussing actual issues, or to raise funds, the results in judicial elections are hardly surprising.

Minnesota's judicial elections thus reveal the precise results one might suspect Canon 5 would produce. Moreover, its chilling effects on electoral activity are precisely those which spurred the First Amendment. It might be naive to argue that incumbents must never be permitted to use their offices to bolster their own positions--such conduct seems inimical to politics [*897] generally. But American tradition has long recognized that the best defense against such conduct is the right of a people to freely associate, assemble and speak. It may be, as a matter of policy, that an appointed judiciary best protects our liberties. I certainly think so, and the court obviously agrees. But Minnesota has made a different choice, and having chosen an elective selection method it cannot then turn around and quash candidates' constitutionally guaranteed rights. The upshot is this: when a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association. Certainly, a state may regulate corruption as in *Brown*, the integrity of the voting process as in *Burson* and the form of its ballot as in *Timmons v. Twin Cities*

Area New Party, 520 U.S. 351, 137 L. Ed. 2d 589, 117 S. Ct. 1364 (1997). But the state may not unduly curtail speech and association, for they are too central to First Amendment interests in the election process.

B.

The court does not discuss the foregoing authorities. Rather, it tries to sidestep this entire doctrinal inconvenience with a simple argument—that judges are different. It surmises that given the nature of their office, judges, even when elected, warrant different treatment under the First Amendment.[39] The court identifies three interests, all under the rubric of enhancing judicial independence, which it deems sufficiently compelling to warrant the suppression of fundamental rights: safeguarding a judge's ability to apply the law neutrally; maintaining the public confidence in judicial impartiality; and insulating judges from political pressure. *Ante* at [21a, 26a]. Many courts have noted, and I agree, that judges differ from other officials. As a matter of constitutional law, however, the judiciary has no more or less right than any other coordinate branch to insulate itself from the rigors of public debate, particularly in the election context. The court embarks on a path long since foreclosed, as the Supreme Court has directly and pointedly

[39]The court dallies briefly with an analogy between judges and civil servants, drawing heavily on *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973). There, the Court found compelling the interests of forging a civil service capable of enforcing laws without regard to party allegiances, and in avoiding the appearance of bias among federal employees in order to maintain the public confidence. *Id.* at 565. The analogy fails. Offices are made elective rather than appointive in order to introduce a degree of public control. Given the discretion that judges wield, that voters would desire such control is hardly surprising. The state's interests in these two areas are quite divergent.

refused to permit such specialized treatment, even given the court's stated concerns.

The judiciary may not rely on the "maintenance of confidence in the judicial system," essentially the interest advanced by the court today, as a justification for the suppression of protected expression. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 833, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978). In *Landmark Communications*, Virginia attempted to rely on this interest to justify a statute making it a misdemeanor to report on confidential judicial disciplinary proceedings.[40] *Id.* [*898] Recognizing that "the law gives judges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions," the Court ruled "neither the Commonwealth's interest in protecting the reputation of its judges, ***nor its interest in maintaining the institutional integrity of its courts*** is sufficient to justify the subsequent punishment of speech at issue here." *Id.* at 839, 841 (quotation omitted, emphasis supplied). "Injury to official reputation is an insufficient reason for repressing speech that would otherwise be free [and] ***the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales***." *Id.* at 841-42 (quotation omitted, emphasis supplied).

[40]The court may seek to cabin *Landmark Communications* as merely preventing the criminalization of speech whereas this case regards an administrative or professional sanction. The statute in *Landmark Communications* made the challenged conduct a misdemeanor and subjected the paper to a $ 500 fine. While criminal in form, the actual harm in that case was much less severe than the threat judicial candidates face in Minnesota. Failure to abide by ethical canons can subject a lawyer or a judge to sanction, removal or disbarment. In terms of gravity, the restrictions at issue here pose much the greater danger. *See In Re Primus*, 436 U.S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978) (holding that a state's interest in effective judicial administration must bend before an attorney's First Amendment rights).

Landmark Communications extended a well-established body of precedent forbidding judicial efforts at self-isolation from public debate. Potential "disrespect for the judiciary" and worries of the "disorderly and unfair administration of justice" cannot compel the suppression of protected expression. *Bridges v. California*, 314 U.S. 252, 270, 86 L. Ed. 192, 62 S. Ct. 190 (1941). In Bridges, the Court prevented a trial court from silencing newspaper editorial criticism of its conduct during ongoing legal proceedings, because:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion . . . . An enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt, much more than it would enhance respect.

Id. at 270-71.

This argument grows all the stronger in the election context. In *Wood v. Georgia*, 370 U.S. 375, 379-80, 8 L. Ed. 2d 569, 82 S. Ct. 1364 (1962), the Court reversed a contempt order issued against a sheriff who told a grand jury that he opposed its having been empaneled. The state argued such conduct constituted a "clear and present danger" to the administration of justice. *Id.* at 387. However, both the sheriff and the judges involved were elected officials charged with public responsibilities. *Id.* at 390, 395. The sheriff, therefore, "had the right to enter the field of political controversy, particularly where his political life was at stake. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.* at 394-95 (citation omitted); *see also*, *Craig v. Harney*, 331 U.S. 367, 370, 376-77, 91 L. Ed. 1546, 67

S. Ct. 1249 (1947) ("Judges are supposed to be men of fortitude, able to thrive in a hardy climate. . . . Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected."); *Pennekamp v. Florida*, 328 U.S. 331, 336-40, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946) (rejecting a "threat to the impartial and orderly administration of justice" as justification for a contempt order stemming from a political cartoon); *accord Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) (holding that without good cause, criminal trials must be open to the public); *Nebraska* [*899] *Press Ass'n v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976) (affirming principle of judicial transparency).

The First Amendment therefore forecloses the use of criminal or contempt sanctions to suppress criticism of the judiciary. The use of punishing civil and professional sanctions to accomplish the same end is equally offensive. I see little difference between truthful criticisms leveled at a judge by a newspaper editor or elected official on one hand, and a judicial candidate on the other.[41] I similarly see little difference between the use of the contempt power, and the use of a Supreme Court's ability to regulate bench and bar, to silence judicial criticism. Judges, elected or otherwise, are thought to be citizens of honor, integrity and fortitude. By holding office they

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[41]The court argues that Minnesota "seeks not to shield judges from published criticism, but to prevent them from deserving such criticism." *Ante* at [27a] n. 14 (citations and quotations omitted). But the court's cure kills the patient. The worry, presumably, is that candidates will do or say things that pledge or seem to pledge them to certain outcomes in return for support, thus threatening judicial impartiality. The cure is to ensure that candidates can do nothing at all, thus destroying the election Canon 5 set out to save. Whether the court likes it or not, facing public criticism, whatever the source, comes with being a public official. Moreover, it is most certainly part of being a public candidate. This regulation flies in the face of both.

subject themselves to public criticism.[42] *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971). And as elected officers, this holds doubly so for Minnesota's judiciary. A judicial candidate has a right to criticize the opinions, philosophies, rulings and public statements of the incumbent, who has a concomitant right to respond in kind. In sustaining Canon 5, the court permits precisely what these precedents say may not be done, except that rather than only protecting judges from the speech of others, they are apparently designed, according to the court, to protect incumbent judges and judicial candidates from the effects of their own speech. Such paternalistic notions have long been suspect, and are patently unconstitutional. Even granting the court's contention that Canon 5 will prevent some undesirable conduct, the vast majority of the speech and association suppressed will be legitimate, wholesome, democratic activity. Contrary to the court's assumption, judges, in this context, are not different. In the eyes of the First Amendment, they are the same.[43]

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[42]Couching these prohibitions as necessary professional regulations falls similarly short, for the Supreme Court has repeatedly favored First Amendment expression over professional ethical regulations. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978); *In re Primus*, 436 U.S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978).

[43]To bolster its "judges are different" argument, the court relies in part on *Cox v. Louisiana*, 379 U.S. 559, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965), where the Court reviewed a statute prohibiting the picketing of a courthouse with the intent to influence a judge, juror or court officer in the course of his duties. *Id.* at 560. The Court reversed the conviction on the grounds that an official had misrepresented to the defendant that his protesting was legal. *Id.* at 569-70. Despite this holding, the court engaged in a lengthy dictum discussing the statute itself. The statute, the Court observed, regulated only conduct, and did not infringe upon speech or assembly at all. *Id.* at 563.

C.

I turn finally to the more mundane application of the Supreme Court's strict scrutiny jurisprudence. Even accepting that a restriction may serve a compelling state interest, in order to warrant the suppression of otherwise protected speech and [*900] association, it must be necessary to achieve its purpose. *Burson*, 504 U.S. at 198. Despite the court's best efforts, Canon 5 fails this test.

Because a regulation that does not achieve its stated end cannot be necessary, the touchstone of necessity is effectiveness. *Eu*, 489 U.S. at 228-29; *Tashjian*, 479 U.S. 208, 93 L. Ed. 2d 514, 107 S. Ct. 544. For instance, in *Eu*, the state argued that its ban on political party endorsements of primary candidates served the compelling interest of protecting primary voters from confusion and undue influence. *Eu*, 489 U.S. at 228. The Court doubted whether the restriction could achieve its stated rationale because of all the organizations with an interest in primary elections, the ban silenced only political parties. *Id.* at 228 n.18. Many other equally or more vocal groups remained free to endorse whomsoever they wished. Moreover, "the growing number of endorsements by political organizations using the labels 'Democratic' or 'Republican' has likely misled voters into believing that the official governing bodies were supporting the candidates." *Id.* As the restriction did not effect its goal, it was not necessary.[44]

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[44]Ordinarily lawmakers may address problems piecemeal rather than having to propose all-encompassing solutions. Indeed, permitting "over-inclusiveness" and "under-inclusiveness" underpins basic rationality review. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). Such is not the case regarding fundamental rights, however, where we enforce a much higher standard. *Playboy*, 120 S. Ct. at 1888. Here, failure to solve the entire asserted problem is fatal. *See, e.g., 44 Liquormart*, 517 U.S. 484 (Opinion of Stevens, J.); *Discovery Network*, 507

(continued...)

Canon 5 suffers from precisely this same flaw. It bars judicial candidates from attending or speaking at "political organization gatherings" or from seeking, accepting or using endorsements from a "political organization," and defines a "political organization" as a "political party organization." Canon 5 purports to safeguard a judge's ability to apply the law neutrally, to maintain the public confidence in judicial impartiality and to insulate judges from public pressure. Given its restricted application, however, Canon 5 simply cannot achieve these goals.

The court worries that by appearing at, speaking to or being endorsed by a political party, a candidate will appear "in hoc" thereto. As a general proposition, this is simply wrong. The Supreme Court recognized in *Eu* that one cannot conclude from such conduct that a candidate will necessarily tow a party line. 489 U.S. at 225 n. 15. But even accepting the court's premise, Canon 5 falls far short of its goals because it fails to include candidate appearances before, speeches to, or endorsements by other politically active organizations. Candidates remain free to consort with organizations such as the National Organization of Women, the NAACP, the Christian Coalition, the National Association of Manufacturers, the AFL-CIO or the NRA. Many of these organizations are implicitly, and some explicitly, aligned with one or another of the major parties.[45] Candidates remain free to seek and use the endorsements of the insurance lobby, the Minnesota Trial Lawyers Association, or any other

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[44](...continued)
U.S. at 418. Strict scrutiny imposes a much heavier burden on Canon 5 than on the "time, place and manner" restrictions reviewed in *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 470-71 (8th Cir. 1991).

[45]Indeed, statistics from the 2000 election indicate that NAACP members voted for democratic candidates at a *higher* rate than did members of the democratic party.

political or quasi-political organization not organized [*901] as a "political party." If the court's "appearance" concerns are valid, this ought to cause it grave anxiety.

The court argues that political parties are more likely to command a candidate's acquiescence to party positions on the bench. *Ante* at [36a-37a, 43a]. Were this true, the court's argument would still fail because one does not satisfy the necessity requirement merely by solving for the greatest influence, but rather by addressing all significant influences. The court's assertion, however, is untrue. Of all the politically-oriented organizations around, the two major parties are both "big-tent" organizations—ideologically consistent only in their aggregate distinctions one from another. Within each party a variety of opinions on most issues may be found. A candidate's appearance at a party function hardly indicates endorsement of its views. (I am certain that Republicans everywhere will be either delighted or dismayed to know that Ralph Nader's appearance at their national convention last fall signified his support for their platform. *See* Eun-Kyung Kim, *Nader Addresses Youth Convention, AP Online*, WL 24553132 (August 2, 2000).) A speech at a party function supports nothing beyond the candidate's own words, and an endorsement suggests only that the endorser finds a candidate more palatable than any other presently available.

On the other hand, quasi-political organizations, particularly those that focus on a single or only a few issues, are much more likely to demand and command a candidate's attention and support. The Federalist Society, for instance, is an organization dedicated to strict construction. Were it to endorse a candidate, it stands to reason that the candidate would be seen as a "strict constructionist." Abortion issue groups are among those most likely to endorse only candidates who will be thought to adhere strictly to the relevant "party line." Given their focus and intensity, such groups are much more capable than political

parties of bringing their members' wrath to bear on elected officials including judges who stray from their point of view.

The record reflects the increasing role in and influence over judicial election politics exerted by these groups. Among those groups active in recent Minnesota judicial elections were state and local bar associations, the League of Women Voters, an organization called "People for Responsible Government," Minnesota Women Lawyers, Lavender Magazine and the Minnesota Family Council. Such groups can easily bring pressure to bear in judicial elections.[46] Two 1996 examples from judicial elections in other states bear this out. In Nebraska, Supreme Court Judge David Lanphier was defeated in a retention vote after authoring an opinion striking down Nebraska's term limits law. His defeat, largely over the opinion, appears to have been engineered by a single-issue organization named "Citizens for Responsible Government." Similarly, Justice Penny White of the Tennessee Supreme Court was hounded out of office after voting with the majority to remand a death penalty case. The influence of such groups featured prominently in the testimony when the Minnesota Supreme Court held a hearing on whether to expand Canon 5 to exclude all such groups, rather than just political parties. [*902]

The court leaves single-issue political parties such as the Twin-Cities Area New Party, which brought the suit in Timmons, entirely out in the cold. Many smaller parties including the Right to Life Party, the Natural Law Party, and until this recent election cycle, the Green Party, tend to focus

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[46]During the 2000 campaign, two Supreme Court justices received between eight and fifteen percent of their total contributions from one plaintiff's law firm, which had previously been accused of attempting to buy elections with tobacco settlement money. Candidate Filings, Minnesota Board of Campaign Finance & Public Disclosure (2000). Canon 5 does not solve electoral problems, but merely selectively sweeps them under the rug.

on only a few key issues. These groups are distinguished from advocacy groups only by having exercised their right to organize as a political party. Under the court's opinion, having done so will cost them their rights to engage in election-related speech and association.

If the Minnesota Supreme Court is truly worried about the appearance of or actual judicial bias, it ought to be concerned with more than political parties. By ignoring other political groups, Canon 5 leaves unregulated sources of funding, endorsements and pressures, which, if the court's concerns about judicial partiality are justified, do much more to undermine public perception than political parties. In fact, barring political party involvement will most likely make the system less tenable. By removing the only organizations that endorse candidates across a spectrum of issues, voters are left with only the shrill voice of narrow advocacy coming from special interest groups. Because the canons do not achieve their stated goals, they cannot be considered necessary, and therefore cannot pass strict scrutiny.

D.

Not only must a restriction on speech be necessary, it must also be narrowly tailored to use the least restrictive means in achieving its stated goal. *Burson*, 504 U.S. at 198. In doing so, a restriction must suppress as little protected activity as possible. "If a less restrictive alternative would serve the Government's purpose, the [state] must use that alternative." *Playboy*, 120 S. Ct. at 1886. Canon 5 runs rampant through acres of protected speech, and in doing so eschews many less restrictive options.

If the court's goals do accurately reflect the actual interests of the people of Minnesota, they could be most efficiently and effectively achieved by amending the Minnesota Constitution to allow for the appointment, rather than the election of judges.

This would achieve the court's interests in one stroke, without requiring the suppression of a single protected word. In undertaking its "narrowly tailored" analysis, the court does not discuss this option. Of course, doing so would reopen for the court the sticky problem of Minnesota's having repeatedly expressed a preference for elected judges.

Compliance with the First Amendment does not require so radical a change, for other states have successfully adopted a variety of mechanisms to insulate their judges from the pressures of elected office without impermissibly trenching on protected constitutional rights. Various states, including Nebraska and Tennessee, have adopted the Missouri Plan, discussed in Section I, whereby initially-appointed judges stand in periodic retention elections. Other states have used a more piecemeal approach, remedying specific problems. Some, for instance, alleviate the financial pressures faced by judges for whom the bench provides a livelihood by lengthening terms of office or by providing generous pensions in order to ease the transition back to private practice. Of course, Minnesota's failure to adopt any such scheme does not license the Minnesota Supreme Court to impose on judges and their putative supporters ethical canons abusive to their First Amendment rights.

III.

In sum, the court starts with a series of premises, many of which I accept. The [*903] Supreme Court of Minnesota has every right to regulate the state's bench and bar. It may protect its judiciary against both actual and the appearance of partiality. It may adopt measures tempered to do so in the ordinary course of its judiciary's conduct. However, that principle of judicial independence, as has been recognized by almost every court to take up the question, must give way before rights which, unlike the court's policy, have been constitutionally

secured. Judges, whatever their differences from other officials, have no more right than others to avoid the rigors of public debate and public elections. No matter what the wisdom of placing the judiciary beyond the rigors of such activities, and no matter what selection method we as federal judges may prefer, the people of Minnesota have adopted an elective judiciary--a system which under our Constitution, must come replete with speech and associational rights.

Because the court finds compelling an interest that is not shared by the people of Minnesota, trumps well established speech and associational rights with values not adopted by the citizens of the state, permits the erection of an unconstitutional self-insulating barrier between the judiciary and the public, and permits regulations that are neither necessary nor narrowly tailored, I must respectfully dissent.

[63 F. Supp. 2d 967; parallel cites and F. Supp. pagination added to court opinion]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Republican Party of Minnesota, an association; Indian Asian American Republican of Minnesota, an association; Republican Seniors, an association; Young Republican League of Minnesota, a Minnesota nonprofit corporation; Minnesota College Republicans, an association; Gregory F. Wersal, individually; Cheryl L. Wersal, individually, Mark E. Wersal, individually; Corwin C. Hulbert, individually; Campaign for Justice, an association; Minnesota African American Republican Council, an association; Muslim Republicans, an association; Michael Maxim, individually; and Kevin J. Kolosky, individually,

Plaintiffs,

v.

[*970] AMENDED MEMORANDUM OPINION AND ORDER
Civil No. 98-831 (MJD)

[stamped in bottom margin]
FILED SEP 14 1999
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD SEP 14 1999
DEPUTY CLERK

Verna Kelly, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor, Charles E. Lundberg, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and Edward J. Cleary, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants.

Tony P. Trimble, Erick G. Kaardal, Trimble & Associates, Ltd., for and on behalf of Plaintiffs Republican Party of Minnesota, Minnesota African American Republican Council, Indian Asian American Republicans of Minnesota, Muslim Republicans, Republican Seniors of Minnesota, Young Republican League of Minnesota, Minnesota College Republicans, Cheryl L. Wersal, Mark E. Wersal and Corwin C. Hulbert.

Daniel G. Currell, Winthrop & Weinstine, P.A., for and on behalf of Plaintiff Michael Maxim.

William F. Mohrman, Mohrman & Co., P.A., for and on behalf of Plaintiff Gregory F. Wersal, Campaign for Justice and Kevin Kolosky.

Mark B. Levinger, Assistant Minnesota Attorney General for and on behalf of Defendant The Honorable Charles Flinn Jr., Chair of the Minnesota Board of Judicial Standards.

Thomas C. Vasaly, Assistant Minnesota Attorney General for and on behalf of Defendants Charles Lundberg, Chair of the Minnesota Lawyers Professional Responsibility Board and Edward Cleary, Director of the Minnesota Office of Lawyers Professional Responsibility Board.

Steven B. Young, Minnesota Civil Liberties Union as Amicus Curiae urging the Court to grant Plaintiffs' motions for summary judgment.

In this action, Plaintiffs seek declaratory and injunctive relief, enjoining the Minnesota Lawyers Professional Responsibility Board ("Lawyers Board"), the Minnesota Office of Lawyers Responsibility ("Office of Professional Responsibility") and the Minnesota Board of Judicial Standards ("Judicial Board") from enforcing sections of Canon 5 of the Code of Judicial Conduct (the "Judicial Codes"), which prohibits judicial candidates from engaging in certain conduct during judicial campaigns, on the basis that such prohibitions unconstitutionally infringe upon their rights of free speech, free association and equal protection guaranteed under the United States and Minnesota Constitutions. Plaintiffs also seek an award of reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

Background

1. The Parties

Plaintiff Gregory F. Wersal ("Wersal") is an attorney licensed to practice law within the state of Minnesota. Complaint ¶ 6. In 1996 and 1998, he was a judicial candidate for the position of Associate Justice of the Minnesota Supreme Court. *Id.* Wersal's campaign committee, Campaign for Justice, his wife, Cheryl L. Wersal, and brother, Mark Wersal are also named plaintiffs. *Id.* ¶¶ 7, 8 and 10. Plaintiff Corwin C. Hulbert

is an unsolicited advocate of Wersal and his endorsement by the Republican Party and its Affiliated Associations. *Id.* ¶ 9. Finally, the Republican Party of Minnesota, together with its Affiliated Associations and their respective members, including Michael Maxim, are named plaintiffs (hereinafter referred to as the "Third Party Plaintiffs"). *Id.* ¶¶ 4 and 5.

The named defendants in this case are the Chair of the Lawyers Board, the Director of the Office of Professional Responsibility and the Chair of the Judicial Board. The Lawyers Board has general supervisory authority over the administration of the Office of Professional Responsibility and the Rules of Professional Responsibility and may issue opinions on questions of professional conduct. Rules on Lawyers Professional Responsibility, 4(c). The Director of the Office of Professional Responsibility and his office are the staff component of the Lawyers Board, whose function is to investigate and prosecute complaints against lawyers. Rules on Lawyers Professional Responsibility 6(a) and 8(a). Following an investigation, the Director determines whether or not discipline is warrante]d, and the type of discipline that is warranted. *Id.* Rules 8(d), 9(a) and 12(a). The Judicial Board has jurisdiction to receive complaints, investigate, conduct hearings and make recommendations to the Minnesota Supreme Court concerning judges alleged to have violated the Codes of Judicial Conduct. Rules of Board on Judicial Standards, 2(a).

2. The Judicial Codes

Judicial codes regulating the conduct of judicial candidates in judicial elections have been existence in Minnesota since at least 1950. Defendants' Lungberg and Cleary, Exs. 19 and 20. In the earlier version of the Judicial Codes, the Canons of Judicial Ethics, judicial candidates were instructed not to engage in making political speeches or from soliciting contributions or endorsements from political parties, because "it is

inevitable that suspicion of being warped by political bias will attach to a judge who becomes an active promoter of the interests of one political [*971] party as against another." *Id.*, Canon 28, Ex. 20, p. 53. A judicial candidate was also instructed not to "announce in advance his conclusions of law on disputed issues". *Id.*, Canon 30, p. 54.

The judicial Codes did become more specific over time. For example, the Codes of Judicial Conduct adopted in 1974 prohibited judicial candidates from the following: making speeches for a political organization, Canon 7 (A)(1)(b)(1993), soliciting funds or making contributions to political organizations, or attending political gatherings, Canon 7 (A)(1)(c), or engage in any other political activity except on behalf of measures to improve the law, the legal system, judicial administration or the administration of justice. Canon 7(A)(4). This set of Canons did allow a judicial candidate to "attend and speak on his or her own behalf at other than partisan political gatherings during the year in which the judge is a candidate for election or reelection." Canon 7(A)(2). Judicial candidates were also directed to maintain the dignity appropriate to judicial office and should encourage family, and employees or public officials subject to the candidate's control from doing what the candidate could not do. Canon 7(B)(1)(a) and (b)(1993). Also, judicial candidates were directed not to make pledges or to "announce his or her views on disputed legal or political issues". Canon 7(B)(c)(1993).

In 1995, the Judicial Codes addressing the regulation of judicial candidates were amended and are now addressed in Canon 5. Canon 5 was again amended on December 23, 1997, by adding language to clarify ambiguities that resulted from the 1995 amendments.[1] The Sections of Canon 5 relevant to this

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[1]For example, the 1995 Judicial Codes prohibited a judicial candidate (continued...)

case, in its present form, are provided below, with the December 1997 amendments underscored:

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06, Subd. 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; *identify themselves as members of a political organization; except as necessary to vote in an election*;
(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;
(c) make speeches on behalf of a political organization;
(d) attend political gatherings; *or seek, accept or use endorsements from a political organization*; or
(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

***

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity

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[1](...continued)
from attending political gatherings in Canon 5A(1)(d), while Canon 5B(1) allowed the judicial candidate to speak to gatherings on his/her own behalf. Ex. J to Wersal Aff.

and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except as otherwise permitted by Section 5B(2), shall not authorize or [*972] knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(I) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent;

***

B. (1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings, *other than political organization gatherings*, on his or her own behalf;

***

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not

prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, ***but shall not seek, accept or use political organization endorsements***. Such committees shall not disclose to the candidate the identity of campaign contributors ***nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation***. A candidate shall not use or permit the use of campaign contributions for the private benefits of the candidate or others.

***

D. Political Organization. For purposes of Canon 5 the term political organization denotes a political party organization.

***

3. Background

Plaintiffs state that during Wersal's 1996 campaign, the Campaign for Justice, as well as Wersal's wife, brother and members of the Republican Party or an Affiliated Association, engaged or participated in one or more of the following types of speech or association on Wersal's behalf: attended gatherings of the Republican party and its affiliated associations and distributed campaign literature and spoke at such gatherings; announced that Wersal was in favor of a strict construction of the Constitution and was critical of certain decisions of the Minnesota Supreme Court; identified Wersal as a member of the Republican party; sought the Republican party's endorsement for Wersal; and solicited campaign contributions. *Id.* ¶¶ 14, 15 and 46. As a result of such conduct, an individual filed a

complaint with the Office of Professional Responsibility against Wersal, alleging violations of Canon 5 of the Judicial Codes. Complaint ¶ 15, Ex. C to Wersal Affidavit. The complainant was concerned with Wersal's attendance and speech at the Republican Congressional District Convention and of his seeking partisan support for his campaign. The complainant also noted concern that Wersal was addressing issues which may come before the court to which he sought election. *Id.*

The complaint was investigated and dismissed for three reasons. First, as to Wersal's attendance at a political gathering, the Director of the Office of Professional Responsibility determined that the Canons in force at that time were ambiguous, as one Canon prohibited attendance at political gatherings while another allowed [*973] speech at a "gathering." Because of the ambiguity, the Director doubted that she could establish that attendance at a political gathering by a judicial candidate was prohibited. *Id.* ¶ 17, Ex. D. With respect to seeking political endorsements, the Director determined that Wersal is only prohibited from personally seeking endorsements, and that Wersal did not engage in this type of conduct. *Id.* As to the issue of announcing views on disputed legal or political issues, the Director stated:

> The current prohibition contained in Minnesota Canon 5A3(d)(i) is identical to Canon 7B(1)(c) of the prior ABA Code of Judicial Conduct (1972 version). The parallel provision of current ABA Model Code of Judicial Conduct (1990 version) does not contain a blanket prohibition against announcing views on disputed issues. Instead, the current ABA provision prohibits "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The ABA adopted the 1990 version out of concern over the constitutionality of the 1972 version. Although adoption of the 1990 version was proposed to the Minnesota Supreme Court in June 1994 by the Minnesota Advisory Committee to review the American Bar Association Model Code of Judicial Conduct, it was not adopted by the Minnesota Supreme Court.

> ***
>
> The Director's Office had doubts about the constitutionality of the current Minnesota Canon and its application to respondent's statements. In addition the Director doubts she would be able to prove by clear and convincing evidence that the statements in respondent's campaign materials constitute an announcement of his views on the issues of crime, welfare or abortion, let alone that they appear to commit respondent with respect to any of these three issues. For these reasons the Director has determined that discipline is not warranted.

Ex. D. to Wersal Aff.

Even though the complaint was dismissed, Wersal asserts that he withdrew his candidacy for Associate Justice as a result of the Complaint, fearing that further Complaints would be filed against him, jeopardizing his ability to practice law. *Id.* ¶ 20.

In January 1997, Wersal announced his intention to once again run for the office of Associate Justice of the Minnesota Supreme Court in the primary and general election of 1998. *Id.* ¶ 21. However, as a result of amendments to Canon 5 of the Judicial Codes that took effect in 1997, Plaintiffs allege that Wersal and others acting on his behalf were no longer able to attend and speak at gatherings of political organizations, were not able to identify Wersal as a member of the Republican Party, were not allowed to discuss Wersal's views on many disputed legal and political issues, and were prevented from soliciting contributions from political parties and from seeking, accepting or using a political party endorsement. *Id.* ¶¶ 27 - 29.

Plaintiffs allege that as a result of Canon 5's prohibitions, Wersal was not endorsed by the Republican Party or any of its Affiliated Associations and because he was not allowed to attend or speak at its political gatherings, the Third Party Plaintiffs were not given the opportunity to hear of Wersal's views on disputed issues. The Third Party Plaintiffs allege that the prohibitions contained in Canon 5, as applied to them, adversely affected its members because they were denied the necessary information about Wersal to allow them to make an informed decision at the voting booth.

In February 1998, Wersal sought an advisory opinion from the Office of Professional Responsibility as to whether the Office intended to enforce the prohibitions against judicial candidates: 1) speaking on [*974] their own behalf to political party organization gatherings; 2) seeking, accepting or using endorsements from a political party organization; and 3) announcing his or her views on disputed legal issues. *Id.*, ¶ 33. The Office of Professional Responsibility responded in the affirmative to the first two questions, but declined to answer the third on the basis that Wersal had failed to specify what statements he would make that may or may not be a view on a disputed legal or political issue. The Director reiterated his concern, however, that the announce clause was not constitutional as written. Ex. W to Wersal Aff.

In their Complaint, Plaintiffs have asserted five separate claims. In Count One, Plaintiffs allege that Canons 5A(1) and B(1), which prohibits judicial candidates, their families and others acting on the candidate's behalf, from attending and speaking at political gatherings, infringes upon their rights to freedom of speech and association as guaranteed them under the United States and Minnesota Constitutions. Complaint ¶ 35. Plaintiffs also allege that this prohibition violates the equal protection clauses of the United States and Minnesota Constitutions, as the Judicial Codes' definition of political organization

affects political organizations such as the Republican Party, but no "special interest" organizations such as political action committees, the Minnesota Trial Lawyers Association or MADD. *Id.* ¶ 40. In Count II, Plaintiffs allege that the ban on judicial candidates from announcing their views on disputed legal or political issues contained in Canon 5A(3), violates the individual plaintiffs' freedom of speech. *Id.* ¶¶ 42 and 61. Counts III and IV assert claims involving the violation of the rights of freedom of speech, freedom of association and equal protection, as a result of the Judicial Codes ban on judicial candidates identifying their political party contained in Canon 5A(1), and the ban on seeking, accepting or using political party endorsements contained in Canon 5A(1) and B(2). *Id.* ¶¶ 62 and 79. Finally, in Count V, Plaintiffs assert Canon 5B(2)'s ban on judicial candidates personally soliciting campaign contributions is a violation of the right to freedom of speech. *Id.* ¶ 102.

Plaintiffs moved for a temporary restraining order to enjoin the enforcement of Canon 5 prior to the precinct caucuses on March 3, 1998. The motion was denied. On November 2, 1998, the Eighth Circuit affirmed this Court's decision to deny the TRO, but expressed no opinion on the merits of Plaintiffs' claims. *Republican Party of Minnesota v. Kelly*, 1998 U.S. App. LEXIS 27946, No. 98-1625 (8th Cir. Nov. 2, 1998).

Currently before the Court are cross motions for summary judgment.

*Standards for Summary Judgment*September 11, 2001

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992).

In order to prevail against the claims asserted in the Complaint, the Defendants must establish that the relevant sections of Canon 5 of the Judicial Codes are narrowly tailored to serve a compelling state interest. *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137, 141-142 (3rd Cir. 1991).[2]

Analysis

I. Bans on Political Activity

A. Compelling State Interest

At issue in this case is the conflict of two principles, the roots of which "lie deep in our constitutional heritage." *Buckley v. Illinois Judicial Inquiry* [*975] *Board*, 997 F.2d 224, 227 (7th Cir. 1993). One is the freedom of candidates to express their views on all matters of interest to the electorate. *Id.* The other, is that "judges should decide cases in accordance with the law rather than with any express or implied commitments that they may have made to their campaign supporters or others." *Id.*

The Defendants herein assert that those provisions of Canon 5 that prohibit a candidate from: 1) attending and/or speaking at gatherings of political parties, 2) identifying himself/herself as a member of a political party, and 3) seeking, accepting or using an endorsement from a political party were enacted because of the long recognized principle that politics can interfere with the actual and apparent integrity and independence of the judiciary. Defendants further assert that the bans on political activity by a judicial candidate are narrowly tailored to serve several compelling state interests: preventing

[2]The Defendants assert that other standards may be applicable to the constitutional challenges presented by Plaintiffs in their Complaint. For purposes of the current motions before the Court, however, the Defendants will not dispute the applicability of the strict scrutiny analysis.

bias or the appearance of bias in favor of the judge's political party or against members of a rival party; preventing bias or the appearance of bias in judge's decisions of particular cases that involve party positions; promoting judicial independence by helping to ensure judges owe their jobs to no one but the general electorate. Defendants assert Canon 5 serves to accomplish these goals by regulating the conduct of the judicial candidate, and those under his or her control while preserving the freedom of the general electorate, including political parties, to seek information necessary to make an informed choice at the voting booth.

Plaintiffs argue that by choosing to elect judges, the state of Minnesota "does not have an independent judiciary." Plaintiff Wersal's Memorandum in Support of Motion for Summary Judgment, p. 2. Plaintiffs further argue that there are no facts to support the Defendants' assertion that political influences have a negative effect on the independence of the judiciary. The Court rejects both of these assertions. Plaintiffs have failed to put forth any authority for its assertion that by choosing to elect judges, the state has no interest in restricting the influences of partisan politics on judicial candidates. As aptly noted by the Third Circuit Court of Appeals: "The fact that a state chooses to select its judges by popular election, while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly." *Stretton*, 944 F.2d at 142. Furthermore, there is sufficient evidence to support the finding that the influences of the political parties have a negative effect on the independence of the judiciary.

Although the framers of Minnesota's constitution adopted the process of judicial selection through popular election, the historical record does not suggest that in doing so, the state disregarded the notion of judicial independence in favor of the political process. In fact, in its summary of the history of

Minnesota's system for selecting judges, the Minnesota Supreme Court wrote that the system eventually adopted by the framers of Minnesota's Constitution recognized the necessity of maintaining an independent judiciary. *Peterson v. R.H. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992) *cert. denied*, 507 U.S. 1033, 123 L. Ed. 2d 475, 113 S. Ct. 1852 (1993).

> The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences. That that goal guided the framers of the federal Constitution to grant life tenure to judges is evidenced by the writings of Alexander Hamilton which expressed concern that life tenure would provide judges sufficient security to allow them [*976] to rule with their consciences and according to the Constitution, rather than to bow to political notions. While the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.

Id. Initially, the framers attempted to distinguish judicial elections by providing judges with seven year terms so that judicial elections would not occur at the same time as elections for other elective office. *Id.* It wasn't until judicial terms were thereafter reduced to six years that "the difficulties associated with partisan [judicial] elections became more evident." *Id.*

One clear example of the influence of political parties upon judicial elections occurred when "at the election of 1898, judicial offices had been dragged into politics." 1 History of the Bench and Bar of Minnesota 66 (1904). Justice William Mitchell

was first appointed to the Minnesota Supreme Court in 1881. At the succeeding election, he was nominated by the democratic and republican party. *Id.* "By the same non-partisan unanimity he was re-elected in 1886 and again in 1892." *Id.* During the election of 1898, however, Justice Mitchell was not nominated by the republican party "and at the election which followed, Minnesota lost its greatest judge."[3] *Id.*

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[3]That Justice Mitchell was a great jurist, respected throughout the country as well as in Minnesota, is illustrated by a letter written by a Harvard Law Professor to a friend in Minnesota. In the letter, Professor Thayer wrote:

> I am astonished that there is doubt of the re-election of Judge Mitchell to your supreme court. I wish the people of Minnesota knew the estimate that is put upon him in other parts of the country, and there could be no doubt about it then . . . I have long recognized Judge Mitchell as one of the best judges in this country, and have come to know also the opinion held of him by lawyers competent to pass on an opinion on such a question . . . Pray do not allow your state to lose the services of such a man. To keep him on the bench is a service not merely to Minnesota, but to the whole country and to the law. Your state it is that is now on trial before the country. The question is: Can Minnesota appreciate such a man? Is it worthy to have him? I am not going to believe that a state which can command the services of one of the few judges in the country that stand out among their fellows as pre-eminent, that give it distinction, will refuse to accept these services. You lawyers of Minnesota must not let party politics work any such result.

1 History of the Bench and Bar of Minnesota, 71.

Justice Mitchell is also the namesake of the William Mitchell College of Law, whose distinguished alumni include The Honorable Warren E. Berger '31, Chief Justice of the United States Supreme Court, 1969-1986, The Honorable Douglas K. Amdahl '51, Chief Justice, Minnesota Supreme Court, 1980-1988, The Honorable Rosalie E. Wahl '67, Associate Justice, Minnesota Supreme Court, 1977-1994, and the Honorable Paul A. Magnuson '63, Chief Judge, United States District Court, District of Minnesota.

To counter the conflicts that had arisen and the potential conflicts that could arise "between the demands of an election process and the judicial impartiality required to decide cases free from political maneuvering", legislation was passed providing for judicial elections to be nonpartisan in 1912. *Peterson* 490 N.W.2d at 422. After judicial elections became nonpartisan, however, the concern remained that political influence would nonetheless infiltrate the judicial election process. For example, in *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (1939), the court was asked to interpret the Minnesota statute[4] that provided that the office of chief justice and associate justice of the Supreme Court and all elective county offices would be non-partisan. Specifically at issue in that case was whether an individual running for the office of the register of deeds could solicit political party support without violating § 294. Although judicial elections were not specifically at issue in *Moon*, Justice Loring nonetheless took the opportunity to submit a concurring opinion to voice his [*977] concern regarding political party endorsements of judicial candidates.

> When candidates for such offices were placed on a non-partisan ballot it was, it seems to me, the purpose of the legislature to lift the judgeships above sordid political influence and to free the candidates from obligation to a political party so that if elected they might render judicial instead of partisan political decisions on matters where party programs, party interests or even prominent party leaders might be involved. *The abuse and accusations of party treason which have been heaped upon some judges in the recent past because of decisions thought to be contrary to the interests of an indorsing [sic] party ought to be evidence enough of the impropriety of party indorsements [sic] and of their purpose to induce partisan political rather than impartial*

[4]1 Mason Minn. St. 1927 § 294.

> *judicial decisions*. Judges are or should be elected to interpret the law as they find it without fear or favor. It poisons the very fount of democracy if they do not do so. Nothing so shakes the confidence of the people in their courts and arouses contempt for their government, as politically minded judges. There can be no propriety in any influence which tends, consciously or otherwise, to prevent impartiality or which tends to create a feeling of party obligation. If the statutes or the constitution, as interpreted by courts, do not suit the people the proper remedy lies in the legislature or by amendment to the constitution, not in judicial misinterpretation.

Id. 288 N.W. at 581-582 (emphasis added). The inherent tension in the judicial election process was again recognized in the 1972 Constitutional Study Commission, Judicial Branch Committee Report, which recognized that qualified lawyers may not seek judicial appointment for fear they will give up their practice only to be defeated by a politician with a popular name" and that the "public finds it distasteful for judges to become embroiled in politics." *Peterson*, 490 N.W.2d at 422-423.[5]

In determining whether the state has a compelling interest in maintaining the actual and apparent independence of the judiciary, the Court must keep in mind the functions of the

[5]This Court is also mindful of numerous examples in other states, in which judicial elections were influenced by partisan politics. *See eg., Geary v. Renne*, 911 F.2d 280, 309-314 (9th Cir. 1990) (J. Alarcon dissenting) *vacated and remanded Renne v. Geary*, 501 U.S. 312, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991) (discussing the effect that California's political parties had on the integrity and independence of the judiciary and local office holders); Penny J. White, *Judicial Independence: Second Steps*, 38 JUDGES' JOURNAL No. 3, P. 5-8 (Summer 1999) (discussing the effect that single issue, negative political maneuvering had on authors' retention election to the Tennessee Supreme Court, as well as other examples).

judiciary, compared to those of the executive and legislative systems.

> The functioning of the judicial system differs markedly from those of the executive and legislative. In those areas, the public has the right to know the details of the programs that candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable so that voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.

Stretton, 944 F.2d at 142. *See also*, *Buckley*, 997 F.2d at 228 ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.") It is these very differences that have been the basis for finding that the state has a compelling interest in imposing restrictions in judicial campaigns. *See e.g.*, *Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977) *cert. denied*, [*978] 435 U.S. 1013, 56 L. Ed. 2d 395, 98 S. Ct. 1887 (1978); *Ackerson v. Kentucky Judicial Retirement and Removal Comm.*, 776 F. Supp. 309 (W.D. Ky. 1991). "An evenhanded, unbiased and impartial judiciary is one of the pillars upon which our system of government rests. To the degree appropriate, the conduct of judicial elections . . . may be regulated so as to meet that interest, even if freedom of speech is thereby constrained." *Ackerson*, 776 F. Supp. at 313. *See also*, *Haffey v. Taft*, 803 F. Supp. 121, 125 (S.D.Ohio 1992)(in upholding state statute that prohibited the identification of judicial candidate's political affiliation on general ballot, court recognized that the state has a significant interest in keeping politics out of judicial elections.)

The United States Supreme Court has recognized, in the context of federal and state employees, that partisan political activities must be limited in order to ensure meritorious performance. *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973) (upholding Hatch Act restrictions on federal employees); *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973) (upholding state statute imposing restrictions on state employees in political party activities).

> Such decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited.

Letter Carriers, 413 U.S. at 557. The Court held that not only was it important that the Government and its employees in fact avoid practicing political justice, it was also "critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Letter Carriers*, at 565.

Applying this rationale to the judicial candidate, the court in *Morial* noted "[t]he government has at least as great an interest in assuring the impartiality of judicial administration of the laws as in assuring the impartiality of bureaucratic administration of the laws." *Id.*, 565 F.2d at 302. The Court in *Letter Carriers* and *Broadrick*, as well as the court in *Morial*, recognized the essential role political parties play in the electoral process, but at the same time recognized that political influence, or the appearance thereof, is simply not compatible with the administration and interpretation of the law.

In support of their position that the state has no compelling interest in preserving an independent judiciary by restricting political activities of the judicial candidate and his/her supporters, Plaintiffs rely on a line of cases that addressed the constitutionality of a California Election Code and a California constitutional provision that banned political party endorsements at primaries and banned political parties from endorsing, supporting or opposing a candidate for nonpartisan office. ***Eu v. San Francisco County Dem. Central Comm.***, 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989); ***Renne v. Geary***, 501 U.S. 312, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991); ***California Democratic Party v. Lungren***, 919 F. Supp. 1397 (N.D. Cal. 1996).

In ***Eu***, the United States Supreme Court held that a ban on political parties' right to endorse candidates at primaries burdened their rights to free speech and free association, and that the ban could survive constitutional challenge only if such ban served a compelling a state interest. The state had argued that the ban served to stabilize government and to protect voters from confusion and undue influence. The Court found, however, that the state had not shown how the ban served these asserted interests. 489 U.S. at 229. Similarly, in ***Lundgren***, the district court struck down a state constitutional [*979] prohibition of party endorsements of candidates for nonpartisan office. In doing so, the court rejected the state's assertion that it had a compelling state interest in preventing voters from being unduly influenced by political party endorsements. ***Lungren***, 919 F. Supp. at 1402 (citation omitted).

Eu and its progeny are not controlling here, however, as the bans at issue in this case focus on the conduct of the judicial candidate, while the ***Eu*** line of cases address bans that restricted the conduct and speech of political parties and its members. This distinction is crucial and was pointed out by the court in ***Lundgren***.

> The court will assume arguendo that California has a compelling interest in preventing nonpartisan officeholders from engaging in conduct that tends to undermine the nonpartisan nature of their posts. Even so, Section 6(b) misses the mark. The evil sought to be combated is the unseemly partisanship of nonpartisan officers once they are in office, not the partisanship of political parties (which, of course, is the very nature of political parties). Section 6(b) purports to prevent officeholders from being "beholden" to political parties by imposing a ban on the parties' speech about candidates for office, rather than (as the Supreme Court approved in Letter Carriers) a ban on the partisan political conduct of the officeholders themselves. ***This distinction is crucial.*** The government has an interest in the manner in which its elected officials conduct themselves while in office. The government does not and cannot have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates for those offices.

919 F. Supp. at 1402 (emphasis added). The court went on to note that "California can, of course, prohibit judges from engaging in partisan political activity once they are in office." *Id.* at 1405 (citing ***Letter Carriers***, 413 U.S. at 564-65.) Clearly, if judges are prohibited from engaging in political activity once in office, then judges that are seeking reelection are similarly prohibited from such activity. In stands to reason, then, that in order to prevent a lawyer candidate from gaining an unfair advantage during an election by garnering the support of a political party, lawyer candidates should also be prevented from engaging in political activity during the election.

The Third Party Plaintiffs argue that Canon 5 as applied to them, does, in fact, infringe on their rights of free speech, free association and of their right to receive information. Thus, ***Eu*** and its progeny are directly applicable to the issue of whether

the state has a compelling interest sufficient to withstand scrutiny. In support of their argument, the Third Party Plaintiffs have submitted twenty examples of how their rights to freedom of speech, association and the right to receive information were infringed by Canon 5. For example, the Third Party Plaintiffs identify a number of its members that did not receive or transmit any information about Wersal or other judicial candidates at Republican Party conventions because of Canon 5. *See generally*, Response Memorandum of Republican Party, ¶ 5-10. Because of these restrictions, the Third Party Plaintiffs argue that it was unable to endorse Wersal for the position of Associate Justice.

This argument is without merit. Nothing in Canon 5 prohibits political parties from endorsing judicial candidates, or from accessing information on a judicial candidate in order to allow them to make an informed choice at the voting booth. The fact that attendees at political gatherings prior to the elections in 1998 misunderstood Canon 5 and its proscriptions does not alter the reality that the Canons do not prevent political parties or its members from seeking information on judicial candidates. While such information is not available at party conventions from the candidate, there exists alternative means [*980] to access information on judicial candidates. For example, candidates are not prohibited from communicating to the voters through the media, literature or on a door-to-door basis.

Finally, Plaintiffs argue that the state has produced no facts to support its assertions that the state has a compelling interest in maintaining an independent judiciary and that restricting political activity by judicial candidates narrowly serves that interest, relying only on conclusory statements. A similar argument was rejected in *Kirchgessner, Jr. v. Wilentz*, 884 F. Supp. 901 (D.N.J. 1995). In *Kirchgessner*, the district court held that a New Jersey Supreme Court policy that prohibited probation officers from becoming affiliated with law enforcement organizations did not violate the probation officers' rights of freedom of association. In so finding, the court held that probation officers, as employees of the judicial branch of government, must be perceived as free from outside influences, and that membership in law enforcement associations would harm that perception. 884 F. Supp. at 913. Plaintiffs in that case had argued that there was no evidentiary support for the court's finding. The court responded to this concern by noting:

> [T]he only way you could have empirical data is when partiality is developed, when conflict is developed and at that point it is too late, the system is brought down under its own weight . . there cannot be any basis, other than for theory unless the system went so awry, unless the system was so rife with corruption or partiality that [the evidence] would [then] become objective. . .
>
> What makes the judiciary viable in any governmental setting is the distance that impartiality and the appearance of impartiality . . . [create and which] people can rely on.

Id.

This Court rejects this argument as well. As recognized by the Minnesota Supreme Court: "A judge has a position of power and prestige in a democratic society espousing justice for all persons under law . . . Our legal system can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions." *Complaint concerning the Honorable Robert Crane Winton Jr.*, 350 N.W.2d 337, 340 (Minn. 1984). It is also well recognized that political activity by a judge or judicial candidate creates a potential for conflicts of interests. *See, e.g., Peterson*, 490 N.W.2d at 422. Accordingly, Defendants need not show that individual cases were decided wrongly due to the corruption of the judicial system caused by those activities prohibited by Canon 5.

The Court finds that Defendants have established that the State of Minnesota has a compelling interest in maintaining the actual and apparent integrity and independence of its judiciary and that the bans on political activity may be upheld if they are narrowly tailored to serve that interest.

B. Narrowly Tailored

Plaintiffs argue that the bans on political activity are not narrowly tailored to serve the state's interest in protecting the independence of the judiciary. Plaintiffs assert that the bans resulted in the Third Party Plaintiffs not being able to receive or transmit any political communications relating to Wersal, such as his name, law school or employer. As noted above, however, this argument is without merit. Alternative means exist through which voters may obtain information concerning judicial candidates. Because such information is available to the Third Party Plaintiffs through such means, the Court finds the Canons are narrowly tailored to serve the state's compelling interests.

C. Vague

The Third Party Plaintiffs further argue that Canon 5 does, in fact, infringe upon their rights under the First Amendment because the Canon is vague. Canon [*981] 5(A)(3)(c) provides that a candidate for judicial office "shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon." The Third Party Plaintiffs assert that this provision is constitutionally vague, as it can be interpreted as prohibiting any supporter of a candidate from engaging in the proscribed political activities, including political parties and their members. They argue that any supporter who attends a political gathering on the judicial candidate's behalf, or otherwise engages in conduct on behalf of the judicial candidate in such a way as to permit an inference that the candidate knew of

such activities, technically violates the Judicial Codes—leaving open the possibility that an ethical complaint may be filed.

The Court finds this argument to be without merit as well. To succeed on the argument that the Canon is unconstitutionally vague, Plaintiffs must show that "men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. at 607. The words "authorize" and "permit" are commonly used words that both involve the concept of consent.[6] "Knowingly permit" is a commonly used phrase in Minnesota statutes, *See*, Levinger Aff., Ex. 8 and 9, and it has been given a narrow construction by the Minnesota Supreme Court. *See, Johnson v. Holzemer*, 263 Minn. 227, 116 N.W.2d 673 (1962). In *Holzemer*, the court held that the phrase "knowingly permit" as used in a criminal statute that declared "every person . . . knowingly permitting any such minor to violate [a firearm's possession law] shall be guilty of a misdemeanor" applied only to those persons having "some right to authoritative control" over such minor, such as a parent, a guardian, a teacher or law enforcement officer. *Id.* 263 Minn. at 237, 116 N.W.2d at 679. Thus, the statute only applied to persons who had the power to give or enforce commands or directions to the minor. *Id.* Given this interpretation by the Minnesota Supreme Court, the terms "authorize" and "knowingly permit" as used in Canon 5(A)(3)(c) applies only to those persons over which the judicial candidate has some right or authoritative control. This interpretation necessarily implies that only if a close connection exists between the judicial candidate and the supporter, will the provisions in Canon 5A(3)(c) come into play.

D. Equal Protection

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[6] "Permit" is defined as: 1. To consent to: Allow. 2. To give permission to or for: authorize. 3. To afford opportunity to. *Webster's II New College Dictionary* (1995). "Authorize" is defined as: 1. To give authority or power to. 2. To approve or permit: sanction. *Id.*

The Third Party Plaintiffs also argue that the partisan political prohibitions provided in Canon 5 violate their right to equal protection as such prohibitions are applicable to political parties only, and not special interest groups. Plaintiffs assert that the asserted compelling state interest of maintaining the independence of the judiciary would also be served by imposing similar prohibitions on special interest groups such as the Minnesota Women Lawyers, or Minnesota Citizens Concerned for Life.

The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the law." To survive an equal protection challenge, Defendants must demonstrate that the state has a compelling state interest justifying the classification, and that such classification is narrowly tailored to serve such interest. At the same time, however, the Court must keep in mind that a state need not exercise the full extent of its power to prevent an evil in order to comply with the equal protection clause. *Morial*, 565 F.2d at 302 n. 6 (relying on *Buckley v. Valeo*, 424 U.S. 1, 29, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)). *See also*, *Broadrick*, 413 U.S. at 607, n. 5 (recognizing that "the legislature [*982] must have some leeway in determining which of its employment positions requires restrictions on partisan political activities and which may be left unregulated. . . And a state can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.")

In this case, the Minnesota Supreme Court "chose to limit what it perceived to be the most problematic type of political conduct by judicial candidates—that linking those candidates with partisan political parties." Memorandum of Defendant Flinn in Support of Motion for Summary Judgment, p. 18. Partisan political activity was determined to be the most problematic given the breadth of the parties' platforms and agendas, and of the greater membership and affiliations than

special interest groups. Furthermore, Defendants assert that special interest groups may exist that would be an appropriate contact for a judicial candidate, such as a group created to support improvements in the administration or organization of the courts.

Other courts have upheld statutes that treat partisan political activity different from non-partisan political activity. *See e.g.*, *Letter Carriers*, 413 U.S. at 562 (upholding Hatch Act, which restricted political activities of federal employees, but not non-partisan political activity); *Bauers v. Cornett*, 865 F.2d 1517, 1525 (8th Cir. 1989).

Because the judicial Codes' restrictions on partisan political activity clearly relate to the state's compelling interests, there is no violation of the equal protection clause. In so finding, the Court has determined not to fault the Minnesota Supreme Court for not exercising the full extent of its power to eradicate all possible sources of improper influence towards the judiciary.[7]

II. Ban on Judicial Candidate Personally Soliciting Contributions

Canon 5B(2) of the Judicial Codes prohibits a judicial candidate from personally soliciting campaign contributions.

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[7]Plaintiff Wersal argues that the state cannot discriminate against political parties as opposed to special interest groups on the basis that the U.S. Supreme Court has consistently held that the government cannot prohibit the fundamental rights of free speech or free association based on the content of the speech or the type of group engaging in the speech. Wersal Reply Memorandum in Support of Motion for Summary Judgment, p.7. Wersal then cites to a number of Supreme Court cases, such as *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992). Plaintiff's reliance *R.A.V.* is misplaced, however. The Court in *R.A.V.* specifically noted that "presumptive invalidity does not mean invariable invalidity, leaving room for such exceptions . . . with respect to certain speech by government employees" citing to *Broadrick*, *supra*, and *Letter Carriers*, *supra*.

The Canon also provides that a judicial candidate may establish a committee to solicit and accept funds on the candidate's behalf, but the committee is prohibited from disclosing the identity of contributors.

Defendants assert that the state has a compelling interest in avoiding "unfair pressure on the solicited, potential pressures on the judge to later show favoritism, and the appearance of corruption." Defendant Flinn Memorandum in Support of Motion for Summary Judgment, p. 21. Defendants further assert that the Canon is narrowly tailored to serve this purpose, as it allows judicial candidates to obtain financial support for his/her campaign through a committee while safeguarding its compelling interest by preventing the candidate from learning of the contributions' source.

A similar ban was upheld by the Third Circuit in *Stretton*, 944 F.2d at 146. *See also*, *Suster v. Marshall*, 951 F. Supp. 693, 704 (N.D. Ohio 1996) *aff'd*, 149 F.3d 523 (6th Cir. 1998) (Ohio Judicial Code prohibiting judicial candidates from personally soliciting campaign funds appeared to be constitutional).

Plaintiff Wersal does not appear to contest that the state has a compelling interest in preventing the undue influence of [*983] money on judicial candidates. Wersal argues, however, that the ban on personal solicitation is unconstitutional as it is not narrowly tailored to serve such interest because other Code provisions protect the interest. Wersal argues that any concern with the corrupt influence of money on judicial candidates is fully alleviated by the Code provision that prevents a judicial candidate from knowing the identity of contributors. In support, Wersal cites to *Stretton* for the proposition that it is the candidate's knowledge of the contribution that gives the appearance of undue influence. The Court does not agree. The court in *Stretton* stressed that a judicial candidate's personal solicitation of campaign contributions "lends itself to the appearance of

coercion or expectation of impermissible favoritism." *Stretton*, 944 F.2d at 146. Thus, although in *Stretton* the court acknowledged that the codes at issue did not prohibit the candidate from learning of contributors' identities, it held that "we cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense, personal solicitation by the candidate." *Id.*

The Third Party Plaintiffs argue that the personal solicitation ban on judicial candidates violates their free speech and associational rights, relying on *Buckley v. Valeo*, *supra* and *Suster v. Marshall*, *supra*. Neither case, however, supports their argument that a ban on personal solicitation by judicial candidates violates first amendment rights. *Buckley* addressed limits on political contributions, and *Suster* addressed contribution limits and a ban on personal solicitation, expressly stating the ban on personal solicitation "appears constitutional."

The Court finds that the state has a compelling interest in preventing the undue influence, and the appearance of undue influence, that may result in a judicial candidate personally soliciting campaign funds. The Court further finds that the Codes are narrowly tailored to serve that interest.[8]

III. Announce Clause

In Count 2 of the Complaint, Plaintiffs argue that the announce clause violates their rights to free speech under the U.S. and Minnesota Constitutions. Prior to addressing the merits of Plaintiffs' claim, the Office of Professional Responsi-

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[8]Wersal argues that he only seeks to personally solicit large groups, and that such a change to the Canons was recommended by the Minnesota State Bar Association. Wersal does not attempt to define "large group" nor does he explain why personally soliciting a large group is distinguishable from other groups. The Court finds, however, that there is no basis for such a distinction.

bility and the Lawyers Board argue that there is no case or controversy before the Court with respect to these Defendants. To establish a case or controversy, a plaintiff must demonstrate that there exists a danger of sustaining an injury as a result of a law's operation or enforcement. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979). It is sufficient if the injury is impending. *Id.* The Lawyers Board and the Office of Professional Responsibility argue that they pose no injury or threat of injury with respect to the announce clause, as they have not enforced the clause and do not intend to do so unless the Court finds the clause constitutional. However, nonenforcement will not be an impediment to finding justiciability where the record does not show that the statute or rule at issue has been commonly and notoriously violated in the past. *See, San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814, 822 (9th Cir. 1987) *aff'd* 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989)(citing *Babbitt*, 442 U.S. at 302-303 and *Epperson v. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968). In this case, there is no showing that the announce clause has been commonly and notoriously violated in the past. Thus, nonenforcement [*984] will not impede a finding of justiciability. Accordingly, the Court finds that it properly has jurisdiction to decide Count II as against all Defendants.

Canon 5A(3)(d)(i) prohibits judicial candidates from "announcing their views on disputed legal or political issues." The Judicial Board[9] asserts that the announce clause serves the compelling state interest of maintaining the actual and apparent impartiality and independence of the judiciary by preventing a candidate from committing himself/herself as to certain issues prior to being faced with a particular case or controversy.

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[9]The Lawyers Board and the Office of Professional Responsibility take no stand on the constitutionality of the announce clause.

A number of courts in other jurisdictions have addressed the same or substantially similar issue. In each, the court has found that the state has a compelling interest in limiting the First Amendment rights of judicial candidates in order to maintain the actual and apparent impartiality and independence of the judiciary. See, *Buckley*, 997 F.2d at 227-228; *Stretton*, 944 F.2d at 142; *Ackerson*, 776 F. Supp. at 312; *American Civil Liberties Union of Florida, Inc.*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990); *Berger v. The Supreme Court of Ohio*, 598 F. Supp. 69, 74 (S.D. Ohio 1984) *aff'd* 861 F.2d 719 (6th Cir. 1988).

> The public has a right to expect that a court will make an assessment of the facts based on the evidence submitted in each case, and that the law will be applied regardless of the personal views of the judge. Taking a position in advance of litigation would inhibit the judge's ability to consider the matter impartially. Even if he or she should reach the correct result in a given case, the campaign announcement would leave the impression that, in fact, if not in actuality, the case was prejudged rather than adjudicated through a proper application of the law to facts impartially determined.

Stretton, at 144.

This Court does not hesitate in finding that the state has a compelling interest, necessitating the restriction of judicial candidates' speech to maintain the integrity of the judiciary. The critical issue with respect to the announce clause is whether it is narrowly tailored to serve that interest. In *Stretton, supra*, the Third Circuit upheld similar language against a constitutional attack by construing the canon narrowly. In doing so, the court noted that the Chief Counsel of the Disciplinary Board, the General Counsel of the Judicial Inquiry and Review Board had interpreted the canon "as prohibiting a candidate only from announcing a position on an issue that may come before the court for resolution." *Id.*, 944 F.2d at 142. In constru-

ing the canon narrowly, the court also recognized that when a statute or regulation is challenged, the court should employ an interpretation that will avoid constitutional difficulties. *Id.* at 143 (citations omitted). The court then found that the State Supreme Court had, in the past, interpreted its rules in the light necessary to obviate the constitutional objections. *Id.*

By contrast, the court in *Buckley*, *supra*, held the identical language violated the First Amendment, because the canon reached far beyond speech that could reasonably be interpreted as committing a candidate in a way which would compromise impartiality if such candidate succeeded in the election. The defendants in *Buckley* urged the court to adopt a narrow construction of the canon, by asserting the canon allows a candidate a right to reply, and that the word "announce" should be read to encompass only statements in which a judicial candidate tells the electorate how he/she will vote on a particular case. The court rejected the invitation to construe the canon in the narrow manner [*985] suggested by the defendants and the district court. [997 F.2d] at 230. The court then went on to distinguish its determination from that in *Stretton*.

> The [Stretton] court did not have the benefit of the insight into the scope of such a rule as is provided by a ruling such as that of the Illinois Courts Commission that condemned so innocuous a statement as a candidate's report of his past record ruling on a particular type of case (Justice Buckley's comment on rape convictions.) Nor did it have to confront the complexities introduced by a concession that a candidate has a broad right of reply or that the word "announce" should be read to mean to foretell one's vote.

Buckley, at 230.

The Judicial Board asserts that the announce clause can and must be interpreted narrowly to preserve its constitutionality, consistent with federal and state law. The Judicial Board further

argues that in those cases that have held similar announce clauses unconstitutional, the courts have done so on the "assumption that the prohibition against announcing views on disputed legal or political issues leaves a judicial candidate with nothing more to discuss and put before the voters other than 'name, rank, and serial number.'" Defendant Flinn Memorandum in Support of Motion for Summary Judgment, p. 24. However, the announce rule does not prohibit judicial candidates from discussing or stating their views as to matters relating to judicial organization and administration, or to other issues involving the character of candidates, their background and experience. *Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979). Thus, contrary to the finding of the court in *Buckley*, the Judicial Codes do not prevent candidates from discussing more than their name, rank and serial number.

Plaintiffs ask the Court to follow those cases that have found similar announce clauses unconstitutional. Plaintiffs further assert that the announce clause is modeled after an earlier version of the American Bar Association ("ABA") Model Canons, but that the ABA recently amended their Model Canons and that the current version provides that a judicial candidate shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. . ." ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(ii). Plaintiffs would ask this Court to find that the fact that the ABA was compelled to change the language of the announce clause is evidence that the announce clause in effect in Minnesota is unconstitutional.

The Court acknowledges that in ruling on Plaintiffs' motions for a preliminary injunction, it initially ruled that Plaintiffs had shown a likelihood of success on the merits of its claim that the announce clause is unconstitutional as written. However, upon closer examination of the applicable case law,

the Court is convinced that the announce clause is constitutional when narrowly construed.

When determining a facial challenge to a statute, the Court must uphold it if the statute's language is readily susceptible to a narrowing construction that would make it constitutional. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988). "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Stretton*, at 144 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988)). The Court further notes that the Minnesota Supreme Court "when possible, . . . narrowly construes a law subject to a facial overbreadth attack so as to limit its scope to conduct that falls outside first amendment protection while clearly prohibiting its application to constitutionally protected expression." *In re the Matter of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991), rev'd on other grounds, *R.A.V. v. City of* [*986] *St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992).

Taking these practices into account, this Court finds that the Minnesota Supreme Court would interpret the announce clause narrowly, consistent with the construction urged upon the Court by the Judicial Board. This Court also notes that the announce clause, in its current form, was adopted by the Minnesota Supreme Court in 1974. Since that time, there have been many contested elections for judicial seats during which there was robust public discussion as to the candidate's qualification.[10] Thus, contrary to Plaintiffs' arguments, there is

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[10]A good example of such an election occurred in 1978, when Associate Justice Rosalie Wahl, the first woman to sit on the Minnesota Supreme Court, was challenged for the seat of Associate Justice by former Attorney (continued...)

no evidence that the announce clause has had a chilling effect on the First Amendment rights of judicial candidates in the past.

In conclusion, by interpreting the announce clause as only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court, the announce clause serves the state's compelling interest in maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech.

IT IS HEREBY ORDERED THAT:

1. The motions of Defendants Judicial Board and the Lawyers Board and the Office of Professional Responsibility for Summary Judgment [Docket Nos. 96 and 99] are GRANTED in their entirety. Plaintiffs' Complaint is hereby DISMISSED with prejudice.

2. The Plaintiffs' Motion for Summary Judgment [Docket No. 48] is DENIED in its entirety.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: Sept. 13, 1999

/s/ Michael J. Davis
Michael J. Davis
United States District Court

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[10](...continued)
General Robert Mattson Sr., Olmstead County District Court Judge Dan Foley and Ramsey County District Judge Jerome Plunkett.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-4021
No. 99-4025
No. 99-4029 *
*
Republican Party of Minnesota, et al. *
Appellants, * Order Denying Petition for Rehearing and for Rehearing En Banc
*
vs. *
*
Barry M. Lazarus, et al., *
Appellees *

The petitions for rehearing en banc are denied. Judges Bowman and Morris Sheppard Arnold would grant the petitions.

The petitions for rehearing by the panel are also denied. Judge Beam would grant the petitions.

(5128-010199)

June 26, 2001

Order entered at the Direction of the Court:
/s/ Michael E Gans
Clerk, U.S. Court of Appeal, Eighth Circuit

MINNESOTA CODE OF JUDICIAL CONDUCT

Effective January 1, 1996

Table of Canons

Preamble

CANON

1. A Judge Shall Uphold the Integrity and Independence of the Judiciary.

2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.

3. A Judge Shall Perform the Duties of the Office Impartially and Diligently.

4. A Judge Shall Conduct All Extra-Judicial Activities so as to Minimize the Risk of Conflict With Judicial Obligations.

5. A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office. Application of the Code of Judicial Conduct.

PREAMBLE

The role of the judiciary is central to American concepts of justice and the rule of law. This Code of Judicial Conduct establishes standards for the ethical conduct of judges to reflect the responsibilities of the judicial office as a public trust and to promote confidence in our legal system. The Code and its individual Canons are designed to provide guidance to judges and candidates for judicial office and to provide a framework for the regulation of conduct through the Board on Judicial Standards. At the same time, the text embodies standards of judicial

and personal conduct intended to be binding on judges and candidates for judicial office. (Effective January 1, 1996.)

. . . .

CANON 5

A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office, MS 204B.06 Subd 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election;

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or seek, accept, or use endorsements from a political organization; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

(2) A judge shall resign the judicial office on becoming a candidate either in a primary or in a general election for a non-judicial office, except that a judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5B(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent; and

(ii) by words or conduct manifest bias or prejudice inappropriate to judicial office.

(e) may respond to statements made during a campaign for judicial office within the limitations of Section 5A(3)(d).

B. Judges and Candidates for Public Election.

(1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings, other than political organization gatherings, on his or her own behalf;

(b) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

C. Incumbent Judges.

A judge shall not engage in any political activity except (1) as authorized under any other Section of this Code, (2) on behalf of measures to improve the law, the legal system or the administration of justice, or (3) as expressly authorized by law.

D. Political Organizations.

For purposes of Canon 5 the term political organization denotes a political party organization.

E. Applicability.

Canon 1, Canon 2(A), and Canon 5 generally apply to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2 of the Minnesota Rules of Professional Conduct.

(Effective January 1, 1998.)

Supreme Court, U.S.
FILED
OCT 26 2001
CLERK

No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, et al.,

Petitioners,

v.

KELLY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the provision of Canon 5 of the Minnesota Code of Judicial Conduct that prohibits candidates for elective judicial office from announcing their views on disputed legal and political issues, as construed by the district court to apply only to statements displaying a pre-disposition on issues likely to come before the court, violates those candidates' First Amendment rights?

II. Whether the provision of Canon 5 of the Minnesota Code of Judicial Conduct that prohibits partisan political activity by incumbent and non-incumbent candidates for elective judicial office violates those candidates' rights, or the rights of political parties, under the First and Fourteenth Amendments?

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STATEMENT OF THE CASE

I. The Decision Of The Eighth Circuit Court Of Appeals.

The court of appeals concluded that the governmental interests underlying the restrictions on partisan political activities in Canon 5 are "undeniably compelling." App. 21a. Those interests include the creation and maintenance of an independent judiciary free from partisan political pressures; preserving public confidence in the independence and impartiality of the judiciary; and ensuring a high caliber of judges by protecting judges from pressure to engage in partisan activities. App. 23a-26a.

The court rejected the contention that Canon 5 is fatally underinclusive. Citing this Court's decision in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the court concluded that it was not arbitrary for Respondents to conclude that political parties pose a greater threat to the integrity and reputation of the judiciary than do non-partisan groups. App. 41a-43a.

The court concluded that the partisan political restrictions were narrowly drawn. Candidates for judicial office have ample means to publicize and disseminate information about their candidacies. App. 36a-37a.

The court concluded that the prohibition in Canon 5 against making statements that "announce . . . views on disputed legal or political issues" ("announce clause"), as construed by the district court, was narrowly tailored to

meet compelling government interests. The state's interests are compelling because making certain statements about future judicial decisions is "fundamentally at odds with the judges' obligation to render impartial decisions based on the law and facts." App. 44a-45a. The court held that Petitioners, by failing to raise the appropriateness of the district court's narrowing construction of the announce clause in their opening briefs to the court, waived that issue, and thus the court analyzed the announce clause as construed by the district court. App. 52a. The announce clause is narrowly tailored because it permits judicial office candidates to discuss a wide range of issues. App. 55a.

II. Statement Of Facts.

Petitioners' statement of the case gives the impression that Petitioner Wersal had his First Amendment rights chilled by his reasonable fear that he would be subject to discipline by the Minnesota Office of Lawyer Professional Responsibility ("Lawyers Board") for violation of the announce clause in Canon 5.[1] In fact, at no

[1] Wersal is not subject to regulation by the Minnesota Board on Judicial Standards ("Judicial Board"), which regulates the conduct of judges in Minnesota. The Lawyers Board regulates the conduct of non-incumbent judicial candidates in judicial elections. Both Boards enforce Canon 5 in judicial elections. At the district court level in this action, the Lawyers Board did not take a position on the constitutionality of the "announce clause." However, at the court of appeals the Lawyers Board joined with the Judicial Board in defending the constitutionality of that clause, as narrowed by the district court. Nevertheless, the Lawyers Board indicated it would continue not to enforce that clause "unless and until it is ultimately held constitutional in this proceeding." *See* Lawyers Board Statement at page x in the Brief of Appellees Edward J. Cleary and Charles E. Lundberg to the court of appeals.

time was Wersal under any actual or implied threat of prosecution by the Lawyers Board, which consistently stated its intention not to enforce that provision.

First, Wersal maintains that he withdrew his candidacy for Associate Justice of the Minnesota Supreme Court in 1996 after an ethics complaint was filed with the Lawyers Board because the threat of such ethics complaints "placed his livelihood as a lawyer and the well-being of his family in jeopardy." Pet. at 4. Wersal asserts that the Lawyers Board "eventually" exonerated him, stating its doubts regarding the constitutionality of the announce clause. *Id.* These assertions imply that Wersal, being under the threat of investigation, withdrew his candidacy. In fact, three weeks after the ethics complaint was received, the Lawyers Board summarily dismissed it. Appendix to Brief of Appellants in Eighth Circuit ("AA ___") at 1643-1646. Wersal was notified of the ethics complaint at the same time he was notified that it had been dismissed. Wersal Aff., ¶ 7, at AA 1614.[2] Thereafter, he attended and spoke at numerous party gatherings. Second Amended Complaint, ¶ 19, at AA 1786. Subsequently, during the summer of 1996, Wersal withdrew as a candidate. Wersal Aff., ¶ 8, at AA 1614. Just a few

[2] Ethics complaints to the Lawyers Board and dismissals of those complaints are not public. Rule 20, Minnesota Rules on Lawyers Professional Responsibility. Thus, unless Wersal or the complainant released the ethics complaint, no one would have known that a complaint had been filed.

months later, in January 1997, with no further action by the Lawyers Board, Wersal announced his intention to be a candidate in the 1998 election. *Id.*, ¶ 10, at AA 1615.

Second, Petitioners contend that, in response to a request from Wersal for an advisory opinion in February 1998, the Lawyers Board "was not willing to state whether it would enforce the [announce clause], but instead stated only that it 'continues to have significant doubts as to whether or not this provision would survive a facial challenge to its constitutionality under the First Amendment to the United States Constitution.' " Pet. at 6. In fact, this quotation from the Lawyers Board letter is immediately followed with another sentence that states:

> Therefore, our policy has not changed and unless the speech at issue violates other prohibitions listed in Canon 5 or other portions of the Code of Judicial Conduct, it is our belief that this section is not, as written, constitutionally enforceable.

AA 1760-61. In addition, the Director of the Lawyers Board told Wersal that the Board could not advise him as to his announce clause question because he had not provided the Board with information about any particular statements he wished to make that might have constituted a view on a disputed legal or political issue. App. 12a.

Petitioners' assertions regarding the Lawyers Board's 2000 advisory opinion, Pet. at 7, are outside the record and not a correct summary of the facts.

The Lawyers Board has never threatened any investigation or action against Wersal for violations of Canon 5. In fact, there is no evidence that either the Lawyers Board, the Judicial Board, or the Minnesota courts have ever enforced the announce clause.

REASONS FOR DENYING THE WRIT

I. Summary Of Argument.

Petitioners have not established that any of the criteria contained in Rule 10 of this Court's rules exist such that this Court should grant the Petition. In particular, the decision below does not conflict with any decision of this Court or with the decision of any other court of appeals.

A. The Announce Clause.

The district court upheld the constitutionality of the announce clause, but only after interpreting it to apply only to announcements of the candidate's position that display a predisposition on those issues likely to come before the court. App. 128a. Petitioners did not properly raise before the court of appeals their argument that the district court acted improperly in narrowing the scope of the clause. Thus, they cannot claim that the decision below conflicts with *Buckley v. Illinois*, 997 F.2d 224 (7th Cir. 1993), in which the court declined to adopt a narrowing interpretation of the same clause. Even if that issue had been properly raised and appropriate for this Court to consider, *Buckley* is distinguishable and the district court acted correctly. Both this Court and the Minnesota Supreme Court adhere to the long-standing principle that courts should construe laws to sustain their constitutionality.

The announce clause is supported by compelling state interests. Litigants have a right and an expectation that a judge will decide cases based upon the law and facts of the case rather than based upon statements made during a campaign. *See, e.g.*, Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059 (Summer 1996). The state has the right to ensure that the judge not be concerned that if he rules a certain way, voters or a political party will feel betrayed and will punish him at the next election. Preserving the appearance of independence and impartiality is equally important. Even if a judge's decision is not affected by the positions he took during the last campaign, the litigants and the public will not know that and may well believe that the decision was based upon statements made during the campaign.

The announce clause is narrowly tailored. Candidates for judicial office may discuss a wide variety of topics.

B. Restrictions On Partisan Political Activities.

The restrictions in Canon 5 on partisan political activity by incumbent and non-incumbent judicial candidates are supported by compelling governmental interests and are narrowly tailored to meet those goals. The decision below is neither inconsistent with any decision of this Court nor with the decision of any other court of appeals.

Specifically, the decision below is not in conflict with *Eu v. San Francisco Co. Democratic Central Comm.*, 489 U.S. 214 (1989). In *Eu*, this Court struck down a statute directly prohibiting political parties from making

endorsements for any offices in partisan primary elections. However, Canon 5 does not prohibit a political party from endorsing candidates for elective judicial office, and the Republican Party endorsed Gregory Wersal for Associate Justice of the Supreme Court in 2000. Pet. at 7. No decision of this Court has extended the rationale of *Eu* to non-partisan elections, let alone to non-partisan judicial elections.

The decision is also not in conflict with *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990), *vac. on other grounds sub nom. Renne v. Geary*, 501 U.S. 312 (1991) (lack of justiciability).[3] *Geary*, as a vacated decision, has no effect and does not state the law in the Ninth Circuit. Even if *Geary* were the law of the Ninth Circuit, it is not in conflict with the decision below. The Ninth Circuit in *Geary* specifically noted that a less drastic means of accomplishing the state's goals would be to provide for "controls on partisan activities of the candidates" (as opposed to controls on the partisan activities of parties). 911 F.2d at 285 (footnote omitted).

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[3] Both the Petition and the amicus brief create confusion regarding the citation of this Ninth Circuit case. The amicus cites the case as *Renne v. Geary*, 880 F.2d 1062 (9th Cir. 1990). Amicus brief at 7. However, the citation "880 F.2d 1062" is to *Geary v. Renne*, a panel decision holding that the challenged statute was constitutional. The quotations on pages 7-8 of the amicus brief are actually from *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990), an *en banc* decision reversing the panel's decision. Petitioners correctly cite to the *en banc* decision, but also mistakenly name the case as *Renne v. Geary*. Petition at 11, 24.

The decision below is also not in conflict with any other decisions of this Court involving the under-inclusiveness doctrine of the First Amendment or the Equal Protection Clause. There are ample legitimate reasons to treat partisan political parties differently from other organizations.

Petitioners have cited no cases striking down restrictions on the partisan political activities of judges or judicial branch employees. Numerous courts have upheld such restrictions.

II. Argument.

A. Canon 5 Is Supported By Compelling Governmental Interests.

The state's interests are compelling regarding the announce clause because making certain statements about future judicial decisions is "fundamentally at odds with the judges' obligation to render impartial decisions based on the law and facts." App. 44a-45a. The court quoted Chief Justice Rehnquist:

> In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without the benefit of judicial oath, briefs, or argument, how he would decide a

> particular question that might come before him as a judge.

Laird v. Tatum, 409 U.S. 824, 836 n.5 (1972) (Mem. on Motion for Recusal). The court concluded the state offered sufficient evidence of widespread and long-standing consensus among members of the bench and bar about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way. App. 49a.[4]

With respect to Canon 5's restrictions on partisan political activities, the court noted that, "[w]hereas, affiliation with a partisan program is thus at the heart of executive and legislative campaigns, a State may conclude that [such affiliation] has no role in judicial campaigns because of the neutral, decision-making nature of the judicial function." App. 17a. In recognition of this difference, the State of Minnesota has provided that its judicial offices are non-partisan. App. 18a, citing Minn. Stat. § 204B.06, subd. 6 (1998) and *Peterson v. Stafford*, 490 N.W.2d 418 (Minn. 1992).

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[4] The court followed this Court's statement in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000), that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." The court, noting that this Court, lower federal courts, the Minnesota Supreme Court, and others have long seen partisanship as posing a threat to judicial integrity, found the evidence presented by the state to be sufficient, particularly in light of Plaintiffs producing no evidence tending to disprove the threat to the integrity or reputation of the judiciary from involvement with partisan politics. App. 28a-33a.

Thus, the court of appeals concluded that the governmental interests underlying Canon 5 are "undeniably compelling." App. 21a. The court deferred to the Minnesota Supreme Court's view that the ideal for the judiciary in Minnesota is "to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide those cases without those influences . . . . " App. 23a, quoting *Peterson v. Stafford*, 490 N.W.2d at 420 (footnote omitted).

The court found as an equally important governmental interest that of preserving public confidence in the independence and impartiality of the judiciary. App. 26a. The court relied in part upon this Court's statement in *Cox v. Louisiana*, 379 U.S. 559, 565 (1965) that "[a] State may also properly protect the judicial process from being misjudged in the minds of the public." Finally, the court found that the state had a very important governmental interest in protecting judges from pressure to participate in partisan activities to ensure a high caliber of judges. App. 26a.

The court of appeals held that the state produced sufficient evidence that the impartiality and appearance of impartiality of the judiciary are threatened by judicial candidates being involved in partisan political activities. App. 30a-33a.

B. Petitioners Did Not Properly Raise At The Court Of Appeals Level Their Challenge To The Announce Clause, As Narrowed By The District Court, And, In Any Event, The Decision Below Is Not In Conflict With Any Decision Of This Court Or Of Any Other Circuit Court Decision.

The district court interpreted the announce clause as "only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court . . . . " App. 129a. In so doing, the district court concluded that the Minnesota Supreme Court would interpret the announce clause narrowly if there were an appropriate case before it, "consistent with the construction urged upon the Court by the Judicial Board." App. 128a.

Petitioner's primary argument in support of its Petition is a claimed conflict between the decision below and the Seventh Circuit decision in *Buckley v. Illinois*, 997 F.2d 224 (7th Cir. 1993). Pet. at 16. In *Buckley*, the court struck down an identical Illinois rule as the announce clause in Canon 5. The *Buckley* court specifically rejected a request to narrowly interpret the rule on the grounds that it was not the proper role of the court to "patch up the rules." 997 F.2d at 229-30. However, contrary to Petitioners' suggestion (Pet. at 18), *Buckley* questioned but did not state definitively that a narrowed construction would not cure the asserted constitutional defect. *Id.*

There cannot be even an arguable conflict between *Buckley*'s refusal to adopt a narrow interpretation and the district court's and the Eighth Circuit's willingness to do so if Petitioners failed to raise the narrowing issue below so that it was before the court of appeals. Petitioners did fail to raise the issue.

Petitioners, in their opening briefs on appeal to the court of appeals, challenged the announce clause as if the district court had not narrowed it. *See* App. 52a. They neither claimed that the district court erred by interpreting the clause narrowly or that the narrowed language was still unconstitutional. Wersal attempted to challenge the propriety of narrowing in his reply brief. The court of appeals properly held that issues not argued in an opening brief could not be raised for the first time in the reply brief, and the court therefore analyzed the announce clause as narrowly construed by the district court. App. 52a. In their Petition, Petitioners do not challenge the Eighth Circuit's determination that Petitioners did not properly raise this issue on appeal.

Despite holding that the appropriateness of the narrowing construction was not before the court, the court of appeals briefly disposed of the substance of Petitioners' challenge by holding that the district court acted properly in narrowing the clause. App. 53a. This Court has long held that federal courts should construe laws to sustain their constitutionality. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Minnesota Supreme Court, as the Eighth Circuit noted, also adheres to this principle of statutory interpretation. App. 53a, citing *In re R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991), *rev'd on other grounds by R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).[5]

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[5] The Minnesota Supreme Court has shown both a sensitivity to First Amendment Rights and a willingness to construe statutes narrowly to protect their constitutionality. *See, e.g., In Re Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978) (although disorderly conduct statute clearly contemplated punishment for speech protected under the First Amendment, Court would uphold its constitutionality by construing it narrowly to refer only to fighting words); *see also State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (on remand from U.S. Supreme Court holding statute requiring display of slow-moving vehicle emblem did not violate Amish defendants' First Amendment rights, Minnesota Supreme Court held statute violated freedom of conscience rights protected by Minnesota Constitution).

Finally, the court below found *Buckley* to be distinguishable in any case. App. 53a, n.24. In contrast to this case or the situation in *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3rd Cir. 1991), in which the Third Circuit narrowly interpreted an identical announce clause in the same manner as did the court below, the *Buckley* court had indications that the clause before it would not be interpreted narrowly by the Illinois Supreme Court. A state disciplinary board had determined that a judge had violated the clause when he commented truthfully on his past record. *Buckley*, 997 F.2d at 229.

In contrast, the Judicial Board has long interpreted the announce clause as permitting discussion of a broad range of issues. A 1990 advisory opinion by the Board, since made known to judicial candidates by letter, states that Canon 5 does not prohibit candidates from discussing appellate court decisions. *See* App. 55a. The court of appeals also noted that the Judicial Board has approved extensive lists of sample questions that interested voters could pose to judicial candidates, consistent with Canon 5. *Id.*

The Judicial Board endorsed the narrowed construction before the court of appeals. *See* App. 53a. The Lawyers Board's determinations and opinions have consistently reflected apprehensions concerning the constitutionality of the announce clause, and that Board adopted a policy of not enforcing the clause until it was determined to be constitutional. The Lawyers Board's and Judicial Board's longstanding policies are consistent with the Minnesota courts' concerns for First Amendment rights and support the narrowed construction of the announce clause.

The four district court or state court cases cited by Petitioners purporting to be in conflict with the decision below are readily distinguishable. *See* Pet. at 18. The three cases involving announce clause language all involve language identical to Canon 5 before narrowing, not as narrowed. *See Beshear v. Butt*, 863 F. Supp. 913, 916 (E.D. Ark. 1994); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1096 (N.D. Fla. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 955 (Ky. 1990). These cases proceed generally on the assumption that judicial candidates are left with little to discuss and put before the voters other than their "name, rank, and serial number," *Buckley*, 997 F.2nd at 227, "biographical data," *ACLU v. Florida*, 744 F. Supp. at 1098, or "professional history," *J.C.J.D.*, 803 S.W.2d at 956, and are thus also distinguishable on these grounds. App. 56a.[6]

[6] The final case cited by Petitioners is *Pittman v. Cole*, 117 F. Supp. 2d 1285 (S.D. Ala. 2000). They claim that the holding of this case is that a "ban on answering questions relating to political and legal issues [is] unconstitutional." Pet. at 18. In fact, this is not the holding of the case. The district court in *Pittman* specifically declined to even address the likelihood of plaintiffs' success on the merits in the context of a preliminary injunction motion. 117 F. Supp. 2d at 1311. Recently, the Eleventh Circuit Court of Appeals vacated the district court's decision, also without addressing the merits of plaintiffs' claims. *Pittman v. Cole*, 2001 WL 1167749 (11th Cir. 2001).

Petitioners have not cited, nor are Respondents aware of, any reported decision holding that the announce clause as narrowed herein is unconstitutional. Thus, there are no reasons for this Court to review the decision below relating to the announce clause.

C. The Decision Below Upholding Canon 5's Restrictions On Partisan Political Activities By Incumbent Judges And Candidates For Judicial Elective Office Does Not Conflict With Any Decision Of This Court Or With Any Other Decision Of A Circuit Court Of Appeals.

The court of appeals concluded that the partisan political restrictions were narrowly drawn to address the State's compelling interests. Minnesota permits candidates for judicial office to speak to gatherings other than political ones; appear in newspaper, television, or other media advertisements supporting their candidacy; and distribute pamphlets and other promotional literature. The candidates may also obtain public statements of support from individuals or other organizations. App. 36a-37a.

Petitioners maintain that the decision below conflicts with the decision of this Court in *Eu vs. San Francisco Co. Dem. Central Comm.*, 489 U.S. 214 (1989), other decisions of this Court addressing the underinclusiveness doctrine

in First Amendment cases or the Equal Protection Clause, and with the decision of the Ninth Circuit Court of Appeals in *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (en banc) *vac. on other grounds sub nom. Renne v. Geary*, 501 U.S. 312 (1991) (lack of justiciability). Pet. at 24-25. In fact, the decision below does not conflict with any of these decisions.

1. The Eighth Circuit's decision is not in conflict with *Eu*.

The decision below is not in conflict with this Court's decision in *Eu*. *Eu* is readily distinguishable on three grounds. In *Eu* the Court struck down state laws prohibiting (1) *political parties* from endorsing candidates for (2) *any office* in (3) *partisan primary* elections. In contrast, Canon 5 operates only on (1) *candidates* for (2) *judicial office* in (3) *non-partisan* elections. Petitioners do not contest that these distinctions exist between this case and *Eu*.[7] Instead, they argue that the distinctions make little

[7] In the lower courts, Petitioners disagreed with the first distinction, arguing that in *Eu* the Court also struck down a statute prohibiting *candidates* from "using" a political party endorsement during a primary election, thereby making *Eu* directly on point. However, in *Eu* the statute actually at issue, Cal. Elec. Code Ann. § 11702, banned Party endorsements in primaries, while a companion election code statute, section 29430, made it a misdemeanor for any primary candidate to claim to be the endorsed candidate. *See Eu*, 489 U.S. at 217. None of the plaintiffs in *Eu* were candidates for office, and their complaint challenged section 11702, not section 29430. *See San Francisco Co. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 817 (9th Cir. 1987). Furthermore, all the discussion in *Eu* relates to

or no difference. Specifically, they argue, with respect to the first distinction, that Canon 5's restrictions on candidates "impose a severe burden on political party endorsements and, therefore, are in conflict with *Eu*." Pet. at 20. With respect to the second and third distinctions, Petitioners rely upon the Ninth Circuit's decision in *Geary* to argue that the logic of *Eu* should be extended to all nonpartisan elective offices, including judicial offices.

Both Petitioners and amicus contend that the decision below is in conflict with *Eu* because Canon 5's prohibitions on candidates seeking, accepting, or using endorsements from political parties is in practical effect a ban on effective party endorsements because political parties cannot get information directly from the candidates themselves or from their families and associates, "the most relevant and credible source." Pet. at 20. They further argue that voters learn about the endorsement most effectively from the candidates themselves. *Id.*; amicus brief at 10.

These arguments are misplaced. As the Eighth Circuit decision recognizes, Canon 5's restrictions on partisan political activities are a narrowly tailored means of regulating the conduct of candidates, while still permitting third parties such as political parties to endorse such candidates. There is only an indirect impact upon political parties, and the extent of such impact is not established in the record. Contrary to Petitioners' assertion, there is nothing in Canon 5 that prohibits Republican

section 11702's effect on political parties, not to any effect of section 29430 on candidates. 489 U.S. at 222-29.

Party members from getting information directly from candidate Wersal or from his campaign. Wersal and his campaign can respond by sending Republican Party members information about his candidacy in the same manner that they can send information to any other interested citizens.

Second, the complaint in this matter does not contend that endorsements made by the Republican Party of Minnesota are worthless and ineffectual. Throughout this case, the centerpiece of Plaintiffs' argument that Canon 5 affected the Republican Party's rights was the claim that the Canon effectively prohibited the Party from endorsing Wersal in 1998. *See* Second Amended Complaint ¶¶ 101, 116, 117; district court decision at 9, App. 104a; Republican Party of Minnesota Brief to Eighth Circuit at 31-32; Republican Party of Minnesota Reply Brief to Eighth Circuit at 21-22. In 2000, following the oral argument in the Eighth Circuit, the Party showed that this claim was without merit by proceeding to endorse Wersal. Pet. at 7. This by necessity led to a major change in Petitioners' arguments.

Petitioners must now point to other, less direct ways in which Canon 5 allegedly affects political parties. In particular, Petitioners and amicus argue for the first time in this case that the Party's endorsement must be communicated by the candidate himself to be meaningful. Pet. at 20; amicus brief at 10. That argument must be rejected for two reasons. First, parties have the ability to choose someone other than the candidate to announce the endorsement. Second, the very reason advanced by amicus for choosing the candidate as a spokesperson – the "practical identity of interests between parties and

their candidates during an election" – means that the candidate's use of the endorsement would communicate the identity of interests to the voters. Amicus Brief at 10 (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 589 (2000)). Such a communication would be antithetical to a non-partisan election.

To show that the impact of Canon 5 on political parties is at all similar to the ban struck down in *Eu*, Petitioners must show at a minimum that voters will not learn of an endorsement unless it is communicated by the candidate rather than another spokesperson for the party. It is not enough to allege that the candidate could do a better job of communicating the endorsement than another spokesperson. For example, in *Renne v. Geary*, this Court said that it did "not believe deferring adjudication will impose a substantial hardship on these respondents" [voters and party members], because they probably could learn of the endorsements through other means than the candidates' statements in the government voting guide. 501 U.S. at 323. *See also* the *Renne* concurrence by Justice Stevens ("[T]o prove injury to *their* interest as informed voters, respondents would perhaps also have to allege they would not otherwise know about the endorsements if the endorsements are not included in mailed candidates' statements.") (emphasis in original). 501 U.S. at 326. Since Petitioners are arguing for the first time that the endorsement can only be communicated by the candidate, the record below is devoid of evidence to support it. In fact, the argument is directly refuted by Petitioners' own statement that the Republican Party's endorsement of Mr. Wersal in 2000 was "widely reported in the newspapers." Pet. at 7.

Eu is further distinguishable in that the severe restrictions upon parties imposed by the statutes under challenge were barely supported by any state interests, let alone compelling ones. The ban on party endorsement in party primaries was a direct interference with the associational rights of political parties and directly hampered the ability of the party to spread its message by stating whether a candidate in the party's own primary adhered to the tenets of the party or whether party officials believed the candidate to be qualified. *See* 489 U.S. at 223.[8] The State claimed this ban helped avoid voter confusion, but the Court found it actually resulted in the opposite. Voters were likely to be misled by the growing number of endorsements by political organizations using the word "Democratic" in their name (e.g., the Berkeley Democratic Club) in an effort to persuade voters they were the "official" Democratic Party. *See* 489 U.S. at 228 n.18.

2. The Eighth Circuit's decision is not in conflict with the Ninth Circuit's decision in *Geary v. Renne*.

Petitioners assert the decision below is in direct conflict with *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990), *vac. on other grounds sub. nom., Renne v. Geary*, 501 U.S. 312 (1991) and with *California Democratic Party v. Lungren*, 919

[8] The ban had the perverse result of preventing the Democratic Party from publishing its opposition to the ultimate winner of a Democratic primary for Congress, even though, as a Grand Dragon of the Ku Klux Klan, the candidate held views antithetical to those of the Party. *See* 489 U.S. at 217 n.4.

F. Supp. 1397 (N.D. Cal. 1996), the only cases extending *Eu* to non-partisan races. Pet. at 24. These cases provide no support for Petitioners. First, *Geary*, as a vacated decision, has no precedential effect and does not state the law of the Ninth Circuit. *Los Angeles County v. Davis*, 440 U.S. 625, 634 n.6 (1979). Thus, there can be no conflict with the court of appeals decision below. Second, neither *Geary* nor *Lungren* addressed restrictions on the conduct of candidates in elections, but addressed laws that prohibited political parties from endorsing candidates in nonpartisan elections. *See* 911 F.2d at 282; 919 F. Supp. at 1398.

Both courts recognized this key distinction. The *Geary* court noted that a less drastic means of accomplishing the state's goals would be to provide for "controls on partisan activities of the candidates" (as opposed to controls on the partisan activities of political parties). 911 F.2d at 285. Similarly, the *Lungren* court noted that the State of California improperly relied upon the Hatch Act *Letter Carriers* case because *Lungren* involved a ban on *political party* speech about candidates for office, rather than "a ban on the *partisan political conduct of the officeholders themselves.*" 919 F. Supp. at 1402 (italics in original). The court found this distinction to be critical, in that the government did not have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates. The court noted that the state could "of course prohibit judges from engaging in partisan political activity once they are in office." *Id.* at 1405.

3. The Eighth Circuit's decision is not in conflict with other First Amendment or Equal Protection decisions of this Court.

Petitioners claim that the decision below is in conflict with decisions of this Court holding that "to single out for punitive measures certain types of speech from certain speakers violates the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Carey v. Brown*, 477 U.S. 455 (1980)." Pet. at 21-22. Petitioners also contend that Canon 5's restrictions are unconstitutional under equal protection analysis for substantially the same reason, the allegedly irrational distinctions between partisan political party activities and non-partisan activities. Pet. at 23. Petitioners rely upon Judge Beam's dissent, in which he states that Canon 5's prohibitions on partisan political activity are fatally underinclusive because candidates may seek and use the endorsement of any individuals or organizations other than political parties. Pet. at 21.

The court of appeals correctly held that only *arbitrary* underinclusiveness poses constitutional problems. App. 35a. Canon 5's restrictions on only partisan activities are not arbitrary. This Court and other courts have held that states may legitimately treat partisan political activity as more of a threat than non-partisan political activity. *See* App. 42a, citing *Letter Carriers*, 413 U.S. at 562 (Court approved wide-spread restrictions on political activities of federal employees even though prohibitions did not extend to non-partisan political activities) and *Bauers v. Cornett*, 865 F.2d 1517, 1525 (8th Cir. 1989) (Court approved constitutional restrictions on state employees soliciting money for a "political purpose," but only by interpreting that term narrowly to apply only to elections

"where political parties play a substantial enough role that the integrity of the civil service would be compromised absent restriction on employee participation" and not apply to elections in which political parties did not play such a role).[9]

The court of appeals also properly rejected Petitioners' equal protection claim. The equal protection clause does not require a state to make an all-or-nothing choice in regulating to avoid a perceived evil. As one court explained: "We . . . reject the implied premise of the Plaintiffs' argument, i.e., that unless the state exercises the full extent of its power to prevent some evil, the state's interest in preventing that evil cannot be considered constitutionally weighty." *Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 305 (5th Cir. 1977) (*en banc*). Even in the context of regulation of First Amendment activity, underinclusiveness is not fatal where the regulation, like Canon 5, is viewpoint neutral.[10] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-89 (1992) ("a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) . . . is in its view greater

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[9] Petitioners have cited no cases striking down restrictions on the partisan political activities of judges or judicial branch employees. Numerous courts have upheld such restrictions. App. 30a.

[10] Canon 5 is viewpoint-neutral because it applies equally to all partisan activities. *See Letter Carriers*, 413 U.S. at 564 (Hatch Act partisan political activity restrictions "are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described.")

there."). As pointed out in *Morial*, this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) acknowledged the government's compelling interest in preventing undue influence on public officials even though Congress had not attempted to eliminate every possible source of such influence. *See* 565 F.2d at 302-03 n.6, citing 424 U.S. 1, 29 (1976). Canon 5 represents a realistic attempt to prevent the practices that are most likely to harm judicial independence.

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court easily disposed of plaintiffs' equal protection claim. Plaintiffs, classified employees, claimed violation of their equal protection rights because they had their political activities prohibited, while unclassified employees were not so restricted. The Court held:

> The legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. *See McGowan v. Maryland*, 366 U.S. 420 (1961). And a State can hardly be faulted for attempted to limit the positions upon which such restrictions are placed.

413 U.S. at 607 n.5. *Accord Perry v. St. Pierre*, 518 F.2d 184, 186 (2nd Cir. 1975).

The court of appeals set forth ample factual reasons to justify differentiating between political parties and other organizations or individuals, under either a First Amendment underinclusiveness analysis or an Equal Protection Clause analysis. App. 42a. Political parties, having large membership and fund-raising organizations, are in the business of electing candidates and are in a better position than other organizations "to hold a candidate in

thrall." *Id.* In addition, because political parties have comprehensive platforms, "obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues." *Id.* (*See, e.g.*, the RPM Platform, AA 871-74). Furthermore, political party activity is far more ubiquitous in elections than is non-partisan group activity, thereby making it more likely the public will identify the judicial candidates with the political parties. Political parties have caucuses, conventions, primaries, lawn signs, slates of candidates, advertising, and sample ballots. Finally, the court noted that legislators owe allegiance to a political party for financial support and endorsement and for political support within the legislative process itself, and the sharing of a common partisan affiliation plays an integral role in enactment of legislation. "If the judiciary is then expected to review such legislation neutrally, a State may conclude that it is crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it." App. 43a.[11]

Furthermore, contrary to the dissent's assertions, App. 90a, the record in this case does not indicate that quasi-political organizations have increasing influence

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[11] Amicus Republican National Committee alluded to the unique nature of political parties by quoting from this Court's decision in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986), that party labels "provide a shorthand designation of the views of candidates on matters of public concern." Amicus brief at 11. Indeed, if judicial candidates were free to seek and use party endorsements, the public would naturally assume that the candidates' views coincided with those of the party and its platform.

over judicial election politics in Minnesota. The fact that there may have been a few isolated instances of endorsements by such organizations does not mean there is a problem requiring a response from the Minnesota Supreme Court at this time.[12] The record indicates that judicial candidates have been deterred from seeking special interest group endorsements because such activities could violate the announce clause and/or "manifest bias or prejudice inappropriate to judicial office." Canon 5.A.3(d)(ii); *Amendment of Canon 5 of the Code of Judicial Conduct Hearing before the Minnesota Supreme Court*, No. C7-81-300, at 12-13 and 87-88, AA 307.[13] The fact that Minnesota has chosen not to address problems that are theoretical rather than actual does not render Canon 5 underinclusive. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) ("We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other types of adult

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[12] The Director of the Lawyers Board testified: "I am not aware that there has been any significant problem in Minnesota with judicial candidates seeking endorsement of special interest groups." Supplemental Affidavit of Edward J. Cleary, ¶ 7, Joint Appendix of Defendants/Appellees to Court of Appeals at DA 51.

[13] As an example of "the increasing role in and influence over judicial election politics exerted" by special interest groups, the dissent below points to Lavender Magazine. App. 90a. What the record shows is that the organization merely solicited candidates to advertise in its magazine. AA 1258-61. The dissent also points to the Minnesota Family Council. What the record contains is a flyer from the Council that does not even refer to judicial elections. AA 1241.

businesses that have been shown to produce the same kinds of secondary effects as adult theaters.").

Petitioners cannot rely upon *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), in which this Court invalidated an ordinance criminalizing "hate speech" on the grounds it imposed special prohibitions on those speakers expressing views on disfavored subjects. *R.A.V.* is inapplicable for two reasons. First, the Court specifically noted that its decision left room for exceptions such as reasonable and viewpoint-neutral content-based discrimination with respect to certain speech by government employees, citing *Broadrick* and *Letter Carriers*. *See* 505 U.S. at 390 n.6. In those cases, of course, the Court approved the banning of a wide range of political speech. Thus, *R.A.V.* does not limit the effect of these Hatch Act cases. Second, the Court noted that a state could prohibit obscenity only in certain media or markets and not others because it would not involve discrimination on the basis of content, or could prohibit only that obscenity which is the most patently offensive, again because the discrimination would not be based upon content. *Id.* at 387-88. Similarly, the partisan political restrictions in Canon 5 prohibit Wersal from speaking in certain places (political party gatherings), but do not regulate the contents of speeches he gives elsewhere.

Petitioners contend that this case is closely analogous to *Carey v. Brown*, 447 U.S. 455 (1980), in which this Court held that a ban on all residential picketing with the exception of peaceful picketing of a place of employment involved in a labor dispute violated equal protection rights. Pet. at 22. In fact, the state lost in *Carey* because the statute gave preferential treatment to the expression

of views on one particular subject, and the avowed purpose of the statute, protecting residential privacy, had nothing to do with the content-based labor/non-labor distinction. *See* 447 U.S. at 471. In contrast, Canon 5 does not accord preferential treatment to the expression of views on a particular subject; candidates are prohibited from speaking on *any* issue to partisan political gatherings, while at other gatherings candidates may speak on any issue as long as they do not violate the announce clause.

Here, the Minnesota Supreme Court chose to limit only what it perceived as the most problematic type of political conduct by judicial candidates – that linking candidates with partisan political parties. The effect of partisan groups on judicial elections differs significantly from the effect of non-partisan groups on those elections.

The court of appeals correctly held that Canon 5 does not violate Petitioners' rights under the First Amendment or the Equal Protection Clause.

CONCLUSION

The petition for writ of certiorari should be denied.

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No. 01-521

In The
Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

KELLY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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Introduction

This case is about the integrity of the selection process of candidates for elective public office. It is about the ability of candidates to effectively communicate information to voters that the voters need in order to vote in an informed manner. It is about restrictions that muzzle and muffle the free speech and free association rights of candidates for elective office – restrictions that are thus presumptively suspect under the Constitution and automatically subject to the strictest scrutiny because they impinge on values at its very heart.

The challenged provisions of Canon 5 of the Minnesota Code of Judicial Conduct would certainly be unconstitutional if applied to candidates for any legislative or executive office. Respondents in effect argue, however, that because the Petitioners are candidates for *judicial* office, any presumption of unconstitutionality is dispelled, scrutiny is relaxed, and a vaunted interest in protecting judicial independence trumps virtually any First or Fourteenth Amendment right the Petitioners raise against the Canon. *See, e.g.*, Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Resp't Br.") at 8-10. In effect, Respondents wrongly seek to transform a case about the integrity of the selection process for candidates for public office into a case about judicial independence.

Like most states, Minnesota has established an elected judiciary. The law-making functions of its common law courts render them similar in this respect to the legislature, and thus properly subject to the direct elective process. The people of Minnesota choose direct voter accountability as a check upon possible judicial abuse in preference to an appointive system.

Minnesota *wants* judicial candidates to campaign; it *wants* to know their views on legal and political matters; it *wants* them to speak out and to seek the approval of voters based on what they say. In an elective judicial system, what-

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ever an interest in judicial independence might entail, it certainly does not include insulating judicial candidates from the rigors of a campaign for public office or from direct accountability to the electorate, as the challenged provisions of Canon 5 seek to do. In an elective judicial system, "judicial independence" cannot and does not mean subversion of the integrity of the elective selection process.

A constitutionally required campaign for judicial office makes no sense unless judicial candidates can effectively communicate their messages to the voting public – including, perhaps especially, the voting public as it organizes itself into political parties. From this perspective, the challenged provisions of Canon 5 serve no legitimate state interest recognized by the Minnesota Constitution insofar as they effectively prevent judicial candidates from doing exactly what the Minnesota Constitution requires them to do: campaign and campaign effectively if they are to achieve public office.

Petitioners do not deny the existence of a significant interest in maintaining judicial neutrality in decisionmaking. But the challenged provisions of Canon 5 are unnecessary to maintenance of judicial decisionmaking neutrality, which is protected by unchallenged provisions of the Canon – such as Canon 5(3)(d)(i), App. 133a, which forbids judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Striking the challenged provisions is necessary, however, to maintain the integrity of the popular election process in which all Minnesota judges must engage in order to achieve judicial office.

I. Petitioners Suffer Injuries-In-Fact Because of The Challenged Provisions of Canon 5.

Respondents suggest that Petitioners have not or do not continue to suffer injuries caused by Canon 5. Resp't Br. at 2-4. They recite the series of events occurring during Petitioner Wersal's 1996 campaign for Associate Justice, apparently in order to imply that he has never been truly threatened with enforcement of the Canons. *See* Resp't Br. at 3-4.

To the contrary, Canon 5's prohibitions on the activities of Petitioner Wersal, his campaign committee, his family, and his friends severely burdened Wersal's ability to campaign and the ability of the Republican Party to endorse Wersal's candidacy, as the record clearly shows. The Canon 5 prohibitions relegated the 1998 and subsequent Republican Party state judicial candidate endorsements to virtual guesswork and denied the Party and its members the opportunity to personally evaluate his credibility as a candidate.[1]

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[1]The record shows that Canon 5 caused Wersal to decline to attend over one hundred Republican meetings leading up to the June 1998 state convention. Wersal Decl. ¶¶ 1-3, 6, 10, 29, at Appendix to Brief of Appellants in Eighth Circuit ("AA") 885-890, 898-899. Wersal's absence at these meetings caused the June 1998 state convention delegates in considering endorsement of Wersal to rely on indirect, secondhand information – opposed to direct, firsthand information from Wersal himself. Cooper Decl. ¶¶ 6-31, at AA 163-169; Maxim Decl. ¶¶ 4-11, at AA 651-652.

In 1998 – as it does every year – the Republican Party sponsored a series of meetings to select its statewide candidates. Copper Decl. ¶ 6, at AA 163. On March 3, 1998, precinct caucuses were held and delegates to state senate district conventions were elected. *Id.* In April of 1998, the state senate district conventions elected delegates to the congressional district and state conventions. *Id.* The eight congressional district conventions were held in May of 1998. *Id.* Finally, the state convention was held in June of 1998. *Id.* At all of these meetings in 1998, Republicans gathered information from statewide candidates and their campaigns – except for Wersal and his campaign – for the purpose of endorsement at the state convention. *Id.* at ¶¶ 7-8, at AA 163-164. Delegates prefer to receive information firsthand from the candidate or the candidate's campaign, rather than secondhand information. *Id.*

Prior to the March 3, 1998, precinct caucuses, the Petitioners moved for a preliminary injunction so that Republicans at the precinct caucuses, state senate district conventions, the congressional district meetings, and the (continued...)

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In addition, Respondents in effect argue that there is no credible threat that Petitioner Wersal will be disciplined by the Minnesota Office of Lawyer Professional Responsibility ("Lawyers Board") for violating the "announce" clause of Canon 5A(d)(i), App. 134a (prohibiting a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues").[2] Resp't Br. at 2, 4. But in 1996, Wersal was in fact subjected to disciplinary proceedings by the Lawyers Board as the result of the clause, as Respondents themselves recount. *Id.* at 3. The Board's present representations that it will not enforce the announce clause depend

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[1](...continued)
state convention could meet and receive information from Wersal. *Id.* ¶¶ 10-21, at AA 164-167. The U.S. District Court refused to enjoin enforcement of Canon 5 prior to the precinct caucuses. *Id.* at ¶ 10, at AA 164. The Eighth Circuit and Eighth Circuit Justice, in turn, prior to the June 1998 state convention, denied similar applications for injunctive relief. *Id.* at ¶¶ 12, 15, 17, and 21, at AA 165-167.

Refused preliminary injunctive relief, Wersal consequently did not attend the March 3, 1998, precinct caucuses, the April 1998 state senate district conventions, the May 1998 congressional district conventions, or the June 1998 state convention. Wersal Decl. ¶¶ 1-3, 6, 10, 29, at AA 885-890, 898-899. Republicans at these events were thus denied the opportunity to meet Wersal who would have been there and given them firsthand information as to his views and permitted the Republicans personally evaluate him. Clayton Decl. ¶ 34, at AA 49; Cooper Decl. ¶ 32, at AA 169-170.

At the June 1998 state convention, Republicans considered the endorsement of Petitioner Wersal for Associate Justice without firsthand knowledge of the candidate. Canon 5 rendered the endorsement process a matter of virtual guesswork based on second-hand information. Maxim Decl. ¶¶ 4-11, at AA 651-652.

[2]Respondents have also erroneously asserted that "[t]he Lawyers Board has never threatened any investigation or action against Wersal for violations of Canon 5." Resp't Br. at 4. The Lawyers Board, based on a complaint filed by the Judicial Board in 2000, has been investigating Wersal for alleged campaign-related misconduct under Canon 5 since December of 2000. Respondents have corrected their statement in this regard in correspondence to this Court dated October 30, 2001.

entirely on whether it is ultimately deemed constitutional – and a declaration that the clause is constitutional is the very outcome that it seeks in this case.

Finally, even if the Lawyers Board will not discipline Wersal under the "announce" clause, the Minnesota Board on Judicial Standards ("Judicial Board") would if he were elected. Petitioner Wersal has run for judicial office in the past and seeks to continue to do so in the future. Regardless of the Lawyers Board's intentions, Wersal's candidacy remains threatened by the very fact that its success would render him subject to the discipline of the Judicial Board if he is seen to violate Canon 5.

II. The Eighth Circuit's Decision Upholding the "Announce" Clause Conflicts With The Seventh Circuit and Decisions of this Court.

The "announce" cause of Canon 5A(d)(i), App. 134a, provides that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." The Eighth Circuit upheld the clause, "[a]s construed by the district court," to prohibit "candidates only from publicly making known how they would decide issues likely to come before them as judges." App. 53a.

Respondents claim that Petitioners may not challenge the district court's construction of the clause because they did not contest it in their opening brief on appeal. Resp't Br. at 12. They also claim there is no conflict between the holding of the Eighth Circuit here and the Seventh Circuit in *Buckley v. Illinois*, 997 F.2d 224, 225 (7th Cir. 1993). *Id.* at 13-14. Respondents misapprehend the nature of the Petitioners' complaint against the announce clause, whether in its plain language or as construed by the district court. In either case, the announce clause is unconstitutionally overbroad. In

either case, the Eighth Circuit's decision conflicts with the precedents of this Court and with the Seventh Circuit in *Buckley*.

First, a construction of the plain language of the announce clause to prohibit discussion of a judicial candidate's views on matters "likely" to come before the candidate if elected simply does not cure the overbreadth problem – the very problem that has led every court that has ruled on the same plain language to hold it unconstitutional. Petitioner Wersal was a candidate for Associate Justice on the Minnesota Supreme Court. How would he be able to judge what sort of legal or political issues are "likely" or "unlikely" to come before him? As the *Buckley* court observed, "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal of general jurisdiction." 997 F.3d at 229. As Judge Beam observed in dissent, the narrowing construction is thus "meaningless." App. 76a. And even if the category suggested by the district court's construction "could be properly cabined, it would still roam far beyond the narrow category of speech left unprotected by the [U.S. Supreme] Court in *Brown [v. Hartlage*, 456 U.S. 45, 53, 71 (1982)]." App. 77a. The "announce" clause is unconstitutional under this Court's precedents. The district court's construction does not save it.

Second, whether or not the clause is construed as the district court suggested, the conflict with *Buckley* is not relieved. The point of the decision in *Buckley* is that the announce clause is unconstitutional even as construed as the district courts both in this case and in *Buckley* identically suggested. 997 F.3d at 229. In contrast and in conflict, the Eighth Circuit here plainly upheld the identical announce clause as construed by the district court. That the Illinois announce clause might have been applied unconstitutionally because a judge had been held to violate it by commenting

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truthfully on his record does not distinguish *Buckley*, as Respondents argue. Resp't Br. at 13-14. No Minnesota state court is bound by the federal court construction of the announce clause. Moreover, the Minnesota announce clause as construed by the district court could be applied in the same way as the plain language of the Illinois clause since any issue already a subject of a judge's record is surely "likely" to come before the judge again, if any issue is.

III. The Eighth Circuit's Decision Upholding Canon 5's Burdens on Candidate Speech and Association and On Political Party Endorsements Conflicts With Decisions of the Ninth Circuit and This Court.

Respondents claim that Canon 5's severe restrictions on free speech and association only have an "indirect" impact on political parties and that the nature of the impact is not established in the record. Resp't Br. at 17. Hence, they claim that Canon 5's restrictions on seeking political party endorsements cannot be equated with the ban on party endorsements held unconstitutional in *Eu v. San Francisco County Dem. Cent. Comm.*, 489 U.S. 214 (1989). But the impact of Canon 5's restrictions are clearly evident in the record. *See* this Brief at 1-4. Moreover, although the Canon does not absolutely ban party endorsements, it so severely hamstrings the candidate and those associated with him that any endorsement made will be essentially in the dark. The party is placed in the preposterous situation of endorsing a candidate that cannot speak or attend its meetings and cannot accept or use the endorsement even if it is given. It makes no sense to recognize a ringing constitutional right of political parties to endorse candidates, as this Court did in *Eu*, yet allow that the State may insist that the endorsement cannot be used by the candidate and that the candidate cannot even be personally assessed at party gatherings. Canon 5 in effect imposes a ban

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on *informed* and *useful* endorsements, which is an effective ban on endorsements themselves.

Respondents' attempt to deny a practical conflict with the Ninth Circuit is similarly tortured. Resp't Br. at 21. It is true that the en banc Ninth Circuit decision holding unconstitutional bans on political party endorsements in non-partisan elections, including judicial elections, was later vacated by this Court, although on purely jurisdictional grounds. *See Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990), *vac. on other grounds sub. nom., Renne v. Geary*, 501 U.S. 12 (1991). However, its substantial holding is obviously followed in the Ninth Circuit, as the holding in *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996), bears witness. Although *Renne* may not be technically binding in the Ninth Circuit, it is as a practical matter, and there is certainly now a very real conflict in circuits for the purpose of invoking the attention of this Court's jurisdiction.

Respondents also claim that *Renne* and *Lundgren* draw a distinction between restrictions on "partisan political activities" of candidates and political party endorsements. Resp't Br. at 21. They then seek to characterize the challenged bans on candidates speaking at or attending political party gatherings and seeking, accepting or using political party endorsements as restrictions on "partisan political activities" of judicial candidates.

But the challenged provisions of Canon 5 have nothing to do with whether judicial candidates can or should act as militant advocates or supporters of political parties. Petitioner Wersal does not propose to organize, raise funds, or tub-thump for the Republican Party or its candidates. Such activities are separately and adequately regulated elsewhere in unchallenged provisions of Canon 5. *See, e.g.*, Canon 5A(1)(a), (b), (c), and (e) at App. 132a. Wersal seeks only to speak to party gatherings in order to promote his candidacy

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and to secure and use the Party's endorsement. It is one thing to ban federally employed postal workers from being precinct captains or party fund-raisers. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). It is quite another thing to forbid a candidate for elective office to attend or speak at party gatherings or to strive to secure the official approval of the party.

The particular injustice imposed by the challenged provisions of Canon 5 is highlighted by the fact that they prohibit only speaking and attending the gatherings of and seeking the endorsement of political *parties*, while they pose no such ban for any other organization, political or otherwise. Respondents seek to justify this discrimination and to escape the clear holdings of this Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Carey v. Brown*, 477 U.S. 455 (1992), by asserting that these cases bar only "arbitrary" forms of discrimination in speech. Resp't Br. at 22. They then claim that the distinction between political parties and all other organizations is rational and defensible because of the supposed special dangers of corruption posed when candidates hobnob with parties because they are large, rich, organized, and can hold a candidate in a thrall. Resp't Br. at 22-23.

On such a basis, the State might legitimately ban candidates from interacting with or receiving the public endorsements of gatherings of the rich and famous or the poor and many. In fact, there is "no reason to see . . . [political party] activities as more likely to serve or be seen as instruments of corruption than [activities] by anyone else." *Federal Election Commission v. Colorado Republican Federal Election Committee*, 11 S. Ct. 2351, 2352 (2001).

Finally, Respondents seek to distinguish *R.A.V.* and *Carey* on grounds that the challenged regulations in those cases discriminated on the basis of content of speech, while the contented provisions of Canon 5 ban *all* speech at politi-

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cal party gatherings, while permitting it elsewhere. Resp't Br. at 27-28. But it is impossible to see why banning certain speech to all listeners is more constitutionally offensive than banning all speech to certain listeners. The First Amendment protects the rights of listeners as much as speakers. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

Conclusion

The petition for writ of certiorari should be granted.

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VERNA KELLY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
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Petition For Certiorari Filed September 24, 2001
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and Campaign for Justice

January 17, 2002

Mark B. Levinger is Counsel for the following Respondent: Minnesota Board of Judicial Standards

Thomas C. Vasaly is Counsel for the following Respondents: Minnesota Lawyers Professional Responsibility Board and Minnesota Office of Lawyers Professional Responsibility

James Bopp, Jr., Thomas J. Marzen, and Richard E. Coleson are Counsel for the following Petitioners: Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-Amerian Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, and Michael Maxim.

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March 9, 1998 – Memorandum Opinion and Order that Plaintiff's motion for a temporary restraining order and/or for preliminary injunctive relief is denied.

September 3, 1998 – Plaintiff's second Amended Complaint.

September 28, 1998 – Edward J. Cleary and Charles E. Lundberg's Answer to Second Amended Complaint.

October 5, 1998 – Verna Kelly's Answer to Second Amended Complaint.

March 12, 1999 – Plaintiff's Motion for Summary Judgment.

March 16, 1999 – Defendants Charles E. Lundberg and Edward J. Cleary's Motion to Dismiss and Motion for Summary Judgment.

March 16, 1999 – Hon. Charles Flynn's Motion for Summary Judgment.

September 13, 1999 – Memorandum Opinion and Order of District Court entered, granting Defendants' Motion for Summary Judgment.

September 14, 1999 – Amended Memorandum Opinion and Order of District Court entered, granting Defendants' Motion for Summary Judgment.

October 12, 1999 – Plaintiffs' Notice of Appeal to the Eighth Circuit by Republican Party of Minnesota, Indian

Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Minnesota African American Council, Cheryl L. Wersal, Mark E. Wersal and Corwin C. Hubert entered.

October 12, 1999 – Plaintiffs' Notice of Appeal to the Eighth Circuit by Michael Maxim entered.

October 13, 1999 – Plaintiffs' Notice of Appeal to the Eighth Circuit by Kevin J. Kolosky, Campaign for Justice and Gregory F. Wersal entered.

November 17, 1999 – Civil case docketed at Eighth Circuit.

April 30, 2001 – Opinion of Eighth Circuit filed.

April 30, 2001 – Judgment of the District Court affirmed.

June 26, 2001 – Eighth Circuit Order denying Petition for Rehearing with Petition for Rehearing En Banc.

September 24, 2001 – Petition for writ of certiorari filed.

October 3, 2001 – U.S. Supreme Court Notice filed that petition for writ of certiorari was filed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, et al.,

Plaintiffs,

vs.

VERNA KELLY, et al.,

Defendants.

Case No. 68-831

AFFIDAVIT OF GREGORY F. WERSAL

(Filed Feb. 27, 1998)

GREGORY F. WERSAL, first being duly sworn and upon oath, deposes and states as follows:

1. I am a 42 year-old husband and father. My wife is Cheryl Wersal. I have a brother named Mark Wersal.

2. I am a lawyer licensed to practice in the State of Minnesota and residing in the State of Minnesota.

3. I was admitted to practice before Minnesota state courts in 1980. I was an unsuccessful candidate for the office of Associate Justice of the Minnesota Supreme Court in 1996. I am a candidate for the office of Associate Justice of the Minnesota Supreme Court in the primary and general elections of 1998. My campaign committee is called Campaign for Justice. Mark Wersal is the chairman of Campaign for Justice.

4. A true and correct copy of the current Republican Party of Minnesota Constitution is attached hereto as Exhibit A.

5. In my 1996 campaign, my supporters and I did the following things on behalf of my campaign:

- attended numerous gatherings of the Republican Party of Minnesota and its Affiliated Associations
- distributed campaign literature at gatherings of the Republican Party of Minnesota and its Affiliated Associations
- spoke at numerous gatherings of the Republican Party of Minnesota and its Affiliated Associations
- sought endorsements from the Republican Party of Minnesota and its Affiliated Associations

True and correct copies of campaign literature distributed on my behalf are attached hereto as Exhibit B.

6. In 1996, an ethical complaint was filed against me with the Office of Lawyers Professional Responsibility. A true and correct copy of the Complaint is attached hereto as Exhibit C and incorporated herein by reference.

7. The Office of Lawyers Professional Responsibility on June 13, 1996, determined that sanctions against me were not warranted. A true and correct copy of the Determination that Discipline is Not Warranted is attached hereto as Exhibit D and is incorporated herein by reference. I was not aware of the Complaint filed against me until my receipt of the Determination from the Office of Lawyers Professional Responsibility.

8. In the summer of 1996, I withdrew as a candidate for Associate Justice as a result of the Complaint filed against me with the Office of Lawyers Professional Responsibility and the risk that further Complaints

would be filed against me and thereby jeopardize my ability to practice law.

9. A true and correct copy of the relevant portion of the May, 1997 Minnesota State Bar Association Judicial Elections Task Force Report and Recommendations is attached hereto as Exhibit E and is incorporated herein by reference.

10. In January of 1997, I announced my intention to be a candidate for Associate Justice in the primary and general elections of 1998.

11. Spurred on by the MSBA recommendation that judicial candidates be permitted to make general solicitations of campaign contributions, I wrote a request to the Office of Lawyers Professional Responsibility in June, 1997 for an advisory opinion. A true and correct copy of the correspondence is attached hereto as Exhibit F and is incorporated herein by reference.

12. The Office of Lawyers Professional Responsibility responded to my request for an advisory opinion. A true and correct copy of the response is attached hereto as Exhibit G and is incorporated herein by reference.

13. From January of 1997 until December 23, 1997, I participated in the activities listed in paragraph 4. True and correct copies of campaign literature for the 1997-1998 campaign are attached hereto as Exhibit X and are incorporated herein by reference.

14. During the summer of 1997, I corresponded with members of the RPM regarding my constitutional rights to attend and speak at gatherings of the RPM. True and correct copies of this correspondence are attached

hereto as Exhibits H and I and are incorporated herein by reference.

15. In September of 1997, the Board on Judicial Standards submitted a petition to amend the Code of Judicial Conduct to the Minnesota Supreme Court. A true copy of this correspondence is attached hereto as Exhibit J and is incorporated herein by reference.

16. The Minnesota Supreme Court issued an Order for a Hearing to Consider Proposed Amendment to the Code of Judicial Conduct. A true and correct copy of the Order is attached hereto as Exhibit K and is incorporated herein by reference. I subsequently filed an informal motion for all justices who stood for election in 1996 and those standing for election in 1998 to recuse themselves from the proceedings. A true and correct copy of the September 15, 1997 informal motion is attached hereto as Exhibit L and is incorporated herein by reference. The Minnesota Supreme Court issued an Order stating recusal was a matter for each individual justice to decide. A true and correct copy of the Order is attached hereto as Exhibit M and is incorporated herein by reference. In the only other Order in the file on the issue, Justice Esther M. Tomljanovich, a judicial candidate for reelection in 1998, declined to recuse. A true and correct copy of the Order is attached hereto as Exhibit N and is incorporated herein by reference.

17. A true and correct copy of the remarks of the Executive Secretary of the Board on Judicial Standards is attached hereto as Exhibit O and is incorporated herein by reference.

18. A true and correct copy of the remarks of Minnesota District Judge Gary J. Meyer is attached hereto as Exhibit P and is incorporated herein by reference.

19. A true and correct copy of the remarks of the Minnesota Bar Association is attached hereto as Exhibit Q and is incorporated herein by reference.

20. A true and correct copy of the remarks of former judicial candidate Bruce A. Peterson is attached hereto as Exhibit R and is incorporated herein by reference.

21. I filed a memorandum with the court noting the unconstitutionality of the proposed changes to the Code of Judicial Conduct. A true and correct copy of the memorandum is attached hereto as Exhibit S and is incorporated herein by reference.

22. On December 23, 1997, the Minnesota Supreme Court amended the Code of Judicial Conduct ("Code"). Canon 5 of the Code now reads in relevant part:

- "[A] candidate for election to judicial office shall not . . . attend political gatherings" or "speak to . . . political organization gatherings, on his or her own behalf." Code, Canon 5 A (1), B (1).
- "A candidate for judicial office . . . shall not . . . announce his or her view son disputed legal or political issues" Code, Canon 5 A (3).
- "A candidate for election to judicial office shall not . . . identify themselves as members of a political organization, except as necessary to vote in an election." Code, Canon 5 A (1).
- "A candidate for election to judicial office shall not . . . seek, accept or use endorsements from a political organization. A candidate may

. . . establish committees to conduct campaigns for the candidate . . . Such committees . . . shall not seek, accept or use political organization endorsements." Code, Canon 5 A (1), B (2).

- "A judicial candidate shall not personally solicit- . . . campaign contributions." Code, Canon 5 B(2).

- [In reference to the above Code provisions only:] "A candidate for judicial office . . . (a) . . . shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate; (b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon; (c) . . . shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon." Code, Canon 5 A (3).

A true and correct copy of the Order is attached hereto as Exhibit T and is incorporated herein by reference.

23. The Code, as amended on December 23, 1997, now prohibits me and others from the following activities if I don't want a complaint filed against me with the Office of Lawyers Professional Responsibility:

- attending gatherings of the Republican Party of Minnesota and its Affiliated Associations

- distributing campaign literature at gatherings of the Republican Party of Minnesota and its Affiliated Associations

- speaking at gatherings of the Republican Party of Minnesota and its Affiliated Associations

- announcing that I am in favor of strict construction of the Constitution and am critical of certain decisions of the Minnesota Supreme Court

- identifying myself as a lifelong member of the Republican Party of Minnesota

- seeking endorsement from the Republican Party of Minnesota and its Affiliated Associations

- soliciting campaign contributions

24. After the Order was issued on December 23, 1997, I, on the advice of counsel, did not do the activities listed in paragraph 24 due to my concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction me for such activities. A list of the meetings where I was scheduled to speak but did not attend because of the Code's ban is attached hereto as Exhibit Y and is incorporated herein by reference.

25. After the Order was issued on December 23, 1997, the members of CFJ, on the advice of counsel and my direction, halted the activities listed in paragraph 24, except for soliciting campaign contributions, due to my concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction me for such activities.

26. After the Order was issued on December 23, 1997, I, on the advice of counsel, discouraged family members, prohibited my employees, discouraged officials

and employees under my direction and control, and avoided knowingly permitting any other person to conduct the activities listed in paragraph 24, except for CJF members soliciting campaign contributions. I took these steps due to my concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction me for such activities.

27. I sought further clarification of the Code's ban by soliciting an advisory opinion from the Office of Lawyers Professional Responsibility on February 9, 1998 and February 17, 1998. True and correct copies of my correspondence are attached hereto as Exhibits U and V and are incorporated herein by reference. I requested this advisory opinion in order to determine how to proceed with my campaign prior to the precinct caucuses which will be held on March 3, 1998.

28. A true and correct copy of the February 24, 1998 advisory opinion of the Office of Lawyers Professional Responsibility is attached hereto as Exhibit W and is incorporated herein by reference.

29. I wish to undertake the activities referenced in paragraph 24 on my own behalf at the March 3, 1998 precinct caucuses and subsequent gatherings of the Republican Party of Minnesota and the Affiliated Associations. However, I will not undertake these activities until I have a court order or changes in the Code indicating that I will not be subject to sanctions if I do.

30. As each gathering of the Republican Party of Minnesota and the Affiliated Associations passes by without such an order or changes to the Code, I am irreparably harmed with respect to my free speech and associational rights by the unconstitutional provisions of the Code.

31. A true and correct copy of an article published by the *Star Tribune* on February 26, 1998, is attached hereto as Exhibit Z and is incorporated herein by reference.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: 2-27-1998

/s/ Gregory F. Wersal
GREGORY F. WERSAL

Subscribed and sworn to before me
this 27th day of February, 1998.

/s/ Erick G. Kaardal
Notary Public

[SEAL] ERICK G. KAARDAL
Notary Public – Minnesota
MY COMMISSION EXPIRES 1-31-00

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Affidavit of Gregory F. Wersal Filed February 27, 1998

[———]* OFFICES, P.A.
[———]
[———] • MINNEAPOLIS, MINNESOTA 55[———]
TELEPHONE (612) [———] • FAX (612) [———]

[———]
[———]
[———]

[———]
OF COUNSEL
[———]
LEGAL ASSISTANT

May 22, 1996

Mr. Pat Burns
Lawyer Professional Responsibility Board
25 Constitution Avenue
St. Paul, MN 55155

Re: Complaint against Greg Wersal

Dear Mr. Burns:

As you will recall I spoke with you briefly on May 20th concerning possible professional misconduct by an attorney who is an announced candidate for the office of Justice of the Minnesota Supreme Court. Because of the office being sought, I first contacted the Board on Judicial Standards and was informed that, because Mr. Wersal is not presently a judge, the appropriate place to file a potential complaint was with the L.P.R.B. Please construe

---

*Indicates various amounts of copy struck through in the original.

this letter to be a complaint consistent with the requirements of Rule 8.3 (a).

The reason for this complaint is my direct observation of the personal campaign activities of Mr. Greg Wersal, an attorney practicing in Hennepin County. I do not know Mr. Wersal personally, nor have I met, or had any professional dealings, with him. My observations are from attendance at a political gathering, and from correspondence, copies of which I have enclosed, which his committee sent to my wife, who is a Republican Party officer.

I was a delegate at the Republican [———] Congressional District convention, at which time numerous candidates for partisan office appeared seeking support of the delegates to that convention. [———].

During the course of candidate appearances that evening, I was surprised when Mr. Wersal appeared on behalf of his candidacy for Supreme Court Justice. He asked for the active involvement of the Republican party in his candidacy but did not seek endorsement of the party that evening. It was very clear to me, however, that he was seeking partisan support for his candidacy.

I have been involved in the Republican party for over 40 years and have been a delegate to many conventions. In my memory that was the first time that I ever heard a candidate for judicial office, especially the highest judicial office in the state, come before a party convention to seek support. My recollection especially was that appearance may have been a violation of the judicial code, but since no endorsement took place, I did not file a complaint.

Recently, my wife received the enclosed documents which I read carefully and in more detail than when I listened to Mr. Wersal's speech before the convention. I have enclosed copies of the materials received by my wife. You will note that the initial document is mailed to "Dear BPOU Chair." That is a Basic Political Organization Unit. She is the Republican Chair for [———] in [———]. Please note that the document sent to her speaks on behalf of Mr. Wersal's campaign committee, seeks endorsement from the upcoming state Republic convention in Duluth, and makes note of the fact that Mr. Wersal personally would be happy to attend district meetings as a speaker.

I believe the comments attributed to Mr. Wersal personally, and his appearance at the [———] District Republican Convention and proposed appearance at the state Republic convention, violates Canon 5A, (1), (d). While Mr. Wersal is not a judge, Rules of Professional conduct 8.2(b) mandates that a lawyer candidate for judicial office must comply with the appropriate provisions of the judicial conduct code.

I have not commented on Mr. Wersal's addressing of issues which may come before the Court to which he seeks election, but I feel those are inappropriate as well. I consider the most visible violations to be his appearance at partisan conventions and the seeking of partisan endorsement for the non partisan position. If additional information is required, I will attempt to furnish it to you, although I've had no further contact with Mr. Wersal, or

his campaign committee, other than what I have included in this letter.

Very truly yours,

[———] OFFICES, P.A.
[———]
[———]
[———]

[———]/ask

Enclosures

cc: Mr. Paul Willette
Board on Judicial Standards
2025 Centre Pointe Blvd.
Suite 420
Mendota Heights, MN

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Affidavit of Gregory F. Wersal Filed February 27, 1998

In the Matter of the Complaint of
[———]
[———]
[———]
against GREGORY F. WERSAL,
an Attorney at Law of the State of Minnesota.

DETERMINATION THAT DISCIPLINE IS NOT WARRANTED

TO: Complainant and the Respondent Attorney Above-Named:

Based upon the documents submitted by the complainant, the Director has decided not to investigate the complaint. Therefore discipline is not warranted pursuant to Rule 8(d)(1), Rules on Lawyers Professional Responsibility. The reasons for this decision are as follows:

Respondent is an announced candidate for associate justice to the Minnesota Supreme Court in this fall's judicial elections. Complainant's complaint arises out of respondent's conduct at the Republican [———] Congressional District Convention and campaign materials sent by respondent's campaign committee to complainant's wife who is the Republican [———] Minnesota. Complainant alleges that respondent's appearance at the [———] District Republican Convention and a proposed

appearance at the State Republican Convention in Duluth violates Canon 5A(1)(d) of the Minnesota Code of Judicial Conduct as it is applied to lawyers who are judicial candidates through Rule 8.2(b), of the Minnesota Rules of Professional Conduct. Complainant also alleges that respondent's conduct in addressing issues which may come before the court in his campaign literature is "inappropriate as well."

Appearance at the Republican Conventions

Canon 5A(1)(d) provides:

> Except as authorized in section 5B(1), a judge or candidate for election to judicial office shall not attend political gatherings.

Canon 5B(1)(a) permits judicial candidates to "speak to gatherings on his or her own behalf." Canon 5B(1)(a) refers to "gatherings" as opposed to "political gatherings." While "political organization" is defined in the Comments to Canon 5, there are no definitions or explanations of either "political gatherings" or "gatherings," nor is there any indication whether "gatherings" include "political gatherings." However, "gatherings" has been interpreted elsewhere to include "political gatherings," provided the candidate is there to speak on his or her own behalf. *See e.g.*, McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns*, American Judicature Society (1990)[1]. *See also* Missouri Commission on

[1] This publication is used by the Minnesota Board on Judicial Standards and its Executive Director in advising judicial candidates on proper campaign conduct. At page 103

Retirement, Removal and Discipline, *Opinion 31* (undated) (in which a judicial candidate was advised that he could attend political gatherings but that his activities should be confined to speaking on his own behalf). Because the Minnesota Judicial Code of Conduct does not address this issue and because others have interpreted gatherings to include "political gatherings," the Director doubts she could establish by clear and convincing evidence that the Canon prohibits respondent's attendance at the conventions and that the Canon provides sufficient notice to respondent that his attendance was prohibited even if the Court's intent in promulgating this Canon was to prohibit candidates from attending and speaking at "political gatherings."

Soliciting Party Endorsement

Canon 5B(2) prohibits a candidate from "personally" soliciting publicly stated support. The rule further provides, however, that the candidate may establish committees to conduct campaigns and to obtain public statements of support for his or her candidacy. According to complainant, respondent did not personally request the endorsement of the republican party when he attended the [———] District Convention. Moreover, the literature sent to complainant's wife as [———] was sent by a committee which appears to be entitled "Campaign for Justice." The letter was sent by respondent's brother

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McFadden includes a chart indicating that speaking at political gatherings is sometimes permitted. This entry is footnoted to indicate that such conduct is permitted provided the judge is a candidate for election and only speaks on his or her own behalf.

and law partner who appears to have some relationship to the committee. Although the letter clearly requests that the republican party endorse respondent for Associate Justice to the Minnesota Supreme Court, the Minnesota Judicial Code of Conduct does not prohibit campaign committees from soliciting such support or such endorsements.

Announcing Views on Disputed Legal or Political Issues

Complainant also raises the issue of respondent's statements made in his "campaign for justice" about three Minnesota Supreme Court decisions. Canon 5A(3)(d)(i) prohibits candidates from announcing their views on disputed legal or political issues.

The current prohibition contained in Minnesota Canon 5A(3)(d)(i) is identical to Canon 7B(1)(c) of the prior ABA Code of Judicial Conduct (1972 version). The parallel provision of current ABA Model Code of Judicial Conduct (1990 version) does not contain a blanket prohibition against announcing views on disputed issues. Instead, the current ABA provision prohibits "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The ABA adopted the 1990 version out of concern over the constitutionality of the 1972 version. Although adoption of the 1990 version was proposed to the Minnesota Supreme Court in June 1994 by the Minnesota Advisory Committee to review the American Bar Association Model Code of Judicial Conduct, it was not adopted by the Minnesota Supreme Court.

Attached as Exhibit A is a summary and comparison of court decisions concerning cases involving the announcing of personal views on disputed issues. the decisions interpreting the 1972 version[2] have found it to be unconstitutional in four of six cases. Moreover, in the *Stretton* decision, the circuit court only found the 1972 version constitutional by reading into the Canon the additional limiting language contained in the 1990 version about *committing or appearing to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court.

The statements in respondent's campaign literature are indeed critical of three Minnesota Supreme Court decisions. However, candidates are not prohibited from criticizing incumbents provided the criticism is truthful and does not bring the impartiality of judiciary into question. *See e.g., In re Baker,* 542 P.2d 701 (Kan. 1975) (candidate permitted to note incumbent judge's health and the delays and increased costs it had caused to the county); *Bundlie v. Christensen,* 276 N.W.2d 69 (Minn. 1979) (candidate could criticize incumbent by pointing out that county's court reporting expenses were higher than in surrounding counties). *See also* State Bar of Michigan Comm. On Legal Ethics and Professional Conduct, *Formal Opinion C-227* (1982) (ethics committee advised candidate for appellate court that candidate could criticize earlier opinion of the appellate court and the legal philosophy underlying that opinion).

The Director's Office has doubts about the constitutionality of the current Minnesota Canon and its

---

[2] Which is identical to the current Minnesota Canon 5A(3)(d)(i).

application to respondent's statements. In addition, the Director doubts she would be able to prove by clear an [sic] convincing evidence that the statements in respondent's campaign materials constitute an announcement of his views on the issues of crime, welfare or abortion, let alone that they appear to commit respondent with respect to any of these three issues. For these reasons the Director has determined that discipline is not warranted.

NOTICE OF COMPLAINANT'S RIGHT TO APPEAL

If the complainant is not satisfied with this decision, an appeal may be made by notifying the Director in a letter postmarked no later than fourteen (14) days after the date of this notice. The letter of appeal should state the reason(s) why the complainant disagrees with the decision. An appealed decision will be reviewed by a designated Lawyers Professional Responsibility Board member, whose options are limited to (1) approving this decision or (2) requiring further investigation. This determination will generally be based upon the information which is already contained in the file.

Enclosed with this notice to the respondent attorney is a copy of complainant's complaint.

Dated: June 13, 1996.

/s/ Marcia A. Johnson
MARCIA A. JOHNSON
DIRECTOR OF THE OFFICE OF
LAWYERS PROFESSIONAL
RESPONSIBILITY
25 Constitution Avenue, Suite 105
St. Paul, MN 55155-1500
(612) 296-3952

Exhibit A

COMPARISON OF COURT DECISIONS CONCERNING CANONS WHICH REGULATE JUDICIAL CAMPAIGN SPEECH

Case Name	Canon Version	Court	Conduct
Stretton (1991) 944 F.2d 137	1972	3rd Cir version	Wanted to announce views on right to privacy, criminal victims rights, meaning of reas doubt, and minorities in jury selection. Upheld rule.
Berger (1984) 598 F.Supp 69	1972	S.D. OH	To announce plans for reformed family law court and pledge more active role in case administration. Upheld rule.
Buckley (1993) 997 F.2d 224	1972	7th Cir modified	Candidate wished to announce his views about abortion and capital punishment. *Struck down* enitre [sic] rule.
Beshear (1991) 773 F.Supp. 1229	1972	E.D. AR	Judge had said during campaign that plea bargainning [sic] in his courtroom was unacceptable. *Struck down* rule, but later rev bcz ct w/o jurisdiction.

ALCU v. Fla Bar (1990) 774 F.Supp. 1094	1972	N.D. FL	Candidate wanted to criticize conduct of incumbent judge. *Struck down* rule.
J.C.J.D. v. R.J.C.R. (1990) 803 S.W.2d 953	1972	KY Sup	Judge had criticized during campaign "fireman's rule", law agst felons with handguns, workers comp std of review. *Struck down* rule & vacated judge's 3 month suspension.
Ackerson (1991) 776 F.Supp. 309	1990	W.D. KY version	*Struck down* rule to extent it prohibited pledges re court efficiency and administration. *Upheld* rule as to statements which appeared to commit atty on legal and policy issues, one of which was right to privacy.
Deters v. Jud Bd (1994) 873 S.W.2d 200	1990	KY Sup	Judge had announced during campaign that he was a Pro-Life Candidate. The 1990 rule was *upheld* and the public censure imposed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Affidavit of Gregory F. Wersal Filed February 27, 1998

February 9, 1998

Edward Cleary
Director of the Office of Lawyers
Professional Responsibility
25 Constitution Avenue, Suite 105
St. Paul, MN 55155-1500

Dear Mr. Cleary:

I am an announced candidate for the Minnesota Supreme Court. The Minnesota Supreme Court recently amended Canon 5 of the Code of Judicial Conduct to prohibit judicial candidates from speaking to political party organizations and prohibiting their campaign committees from seeking, accepting, or using political party endorsements. These are substantial changes to the way judicial elections will be conducted in Minnesota. I believe these changes are unconstitutional violations the candidate's right to free speech and the campaign committee's right to freedom of association. I wish to know whether your office intends to enforce these new rules.

Back in 1996, a complaint was filed against me as a candidate for the Minnesota Supreme Court. Marcia Johnson issued a Determination that Discipline is Not Warranted on June 13, 1996. A copy of that decision is attached. In her Determination, Ms. Johnson stated "the Director's Office has doubts about the constitutionality of the current Minnesota Canon and its application to respondent's statements." Also attached to her decision a

comparison of numerous court decisions striking down language and judicial codes which prohibited judicial candidates from stating their views on disputed legal or political issues.

The new Canon 5 which became effective January 1, 1998, not only contains the prohibition against judicial candidates from announcing their views on disputed legal and political issues; it states that the judicial candidate can not express *any* opinion or view to certain groups of people, i.e., political party members.

The very cases cited by Ms. Johnson in her Determination that Discipline is Not Warranted specifically stand for the proposition that a state regulation unnecessarily burdens the exercise of free speech when it prohibits *all* speech that a candidate may want to give. If your office had doubt about the constitutionality of Canon 5 prior to these changes, it must also have doubts about the new Canon 5 which restrict free speech even more drastically.

As a result of the new Canon 5 I have had to cancel numerous speeches which I was scheduled to give at political party gatherings. I have been advised to sue in U. S. District Court; however, before taking that step I have decided to contact your office. I want to know what position your office will take on the following specific issues:

1) Does your office intend to enforce the prohibition against judicial candidates speaking on their own behalf to political party organization gatherings?

2) Does your office intend to enforce the prohibition against a judicial candidate's campaign committee from

seeking, accepting, or using endorsements from a political party organization?

3) Does your office intend to enforce the prohibition against a judicial candidate announcing his or her views on disputed legal or political issues?

I have attached the memorandum I prepared for the Supreme Court on these issues. I look forward to your prompt response.

Yours truly,

Gregory F. Wersal

GFW/bmh
Enclosures

Wersal Law Office, P.A.
[Address Omitted In Printing]

February 17, 1998

Edward Cleary
Director of the Office of Lawyers
Professional Responsibility
25 Constitution Ave, Suite 105
St. Paul, MN 55155-1500

Dear Mr. Cleary:

This letter is a follow up to our phone conversation of February 17, 1998. At that time, you stated your office would be responding to my letter of February 9, 1998, but that you wanted an opportunity to do research and respond. When I asked you to tell me how long this could take, you were unwilling to give me a specific time and

stated it would be "a couple of weeks". We also discussed the fact that whatever your office decides it may be of limited value because if a complaint were filed against me for violating Canon 5, any decision your office may make at that time could be appealed by the complainant to the next level which could decide that my conduct was unethical and that some sanction should apply.

You noted in our conversation that the issue of restrictions on the speech of judicial candidates was a matter of some discussion nationally. So I would assume you have already had some exposure to the legal issues involved. In addition, two members of your staff attended oral arguments in front of the Minnesota Supreme Court when these rule changes were being considered. At that hearing I clearly stated that I was a candidate for the Minnesota Supreme Court, that I had spoken at numerous political meetings and conventions, and that I believed the proposed rules were unconstitutional infringements of free speech and freedom of association. The fact that your office had two members in attendance tell me that you were already committing resources to these issues. It has now been three months since that hearing and two months since the new rules have taken effect.

I need a prompt response to my previous letter. I need a response from you by February 24, 1998. I need a response from you be then so that I will have sufficient time to contact the various precinct chairs so that I might attend and speak at the political party precinct caucuses which are scheduled for March 3, 1998.

I look forward to hearing from you. You may fax your decision to me at 545-4851 to speed up this process.

Yours truly,

/s/ Gregory F. Wersal/bmh
Gregory F. Wersal

GFW/bmh

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
[Address And Names Omitted In Printing]

February 24, 1998

Mr. Gregory F. Wersal
P.O. Box 26186
Minneapolis, MN 55426

VIA FAX
#545-4851

RE: Letters of February 9 and February 17, 1998

Dear Mr. Wersal:

On February 9, 1998, you sent a letter to my attention as Director of the Office of Lawyers Professional Responsibility framing three questions as it regards the most recent version of Canon 5 effective January 1, 1998, by order of the Minnesota Supreme Court. You indicated "that I have had to cancel numerous speeches which I was scheduled to give at political party gatherings" because of the restrictions contained in Canon 5. In your follow-up letter of February 17, 1998, you set an arbitrary response date of February 24 on the part of this Office "so that I will have sufficient time to contact the various

precinct chairs that I might attend and speak at the political party precinct caucuses which are scheduled for March 3, 1998." the questions were as follows:

1. Does your office intend to enforce the prohibition against judicial candidates speaking on their own behalf to political party organization gatherings?

Since you have provided us enough facts regarding your intention to attend political gatherings and caucuses, we have enough information to issue an advisory opinion as to the proposed conduct.

Canon 5A(1)(d) provides:

> Except as authorized in section 5B(1), a judge or a candidate for election to judicial office shall not:
>
> (d) attend political gatherings; or seek, accept or use endorsements from a political organization.

Canon 5B(1) states, in part:

> A judge or a candidate for election to judicial office may, except as prohibited by law,
>
> (a) speak to gatherings, other than political organization gatherings, on his or her own behalf.

Canon 5D defines political organization as: "a political party organization."

Prior to the recent amendments to Canon 5, the previous Director of this Office had indicated her doubts to you that she could establish by clear and convincing evidence that this section of the Canon prohibited a candidate's attendance at political gatherings "even if the Court's

intention in promulgating this Canon was to prohibit candidates from attending and speaking at 'political gatherings.' " The ambiguity formerly found in this section of Canon 5 has now been removed and the intent of the Court is clear as it regards a ban on judicial candidates speaking to political party organization gatherings.

The State of Minnesota has a compelling interest in the integrity and impartiality of the bench. *See Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 848 (1978). Restrictions designed to address this compelling state interest at times conflict with other critical components of our constitutional framework, including free speech and freely and vigorously contested elections. It is obvious that these interests are in conflict and consequently require balancing in order to arrive at a resolution. In allowing judges and judicial candidates to speak to any gathering except a political party organization gathering, the Minnesota Supreme Court has provided breathing room to those judicial candidates who wish to campaign.

The Court has chosen to specifically proscribe judicial candidates campaigning before political party organizations. Therefore, a licensed Minnesota attorney who speaks to a political party organization gathering in his role as a judge or judicial candidate would be in violation of 5B(1) and could be subject to professional discipline.

2. Does the Office intend to enforce the prohibition against a judicial candidate's campaign committee from seeking, accepting or using endorsements from a political party organization?

Canon 5A(1)(d) states that judges or candidates for election to judicial office shall not: "(d) attend political gatherings; or seek, accept or use endorsements from a political organization" (defined in 5D as a political party organization). 5B(2) prohibits campaign committees from seeking, accepting or using political organization endorsements (denoting political party organization endorsements).

As noted above, the Minnesota Supreme Court has made the determination that licensed Minnesota attorneys that are judges or candidates for judicial office shall not engage in the type of activity that you propose nor allow their campaign committee to be engaged in such activity. It is the belief of this Office that the balancing test referred to previously is met by the Supreme Court's decision to narrowly serve the highly compelling state interest of ensuring the integrity and impartiality of the judicial process by prohibiting the acceptance or use of political party organization endorsements by judges or judicial candidates.

3. Does your office intend to enforce the prohibition against a judicial candidate announcing his or her views on disputed legal or political issues."

Canon 5A(3)(d)(i) provides that judges and judicial candidates shall not, among other things, "announce his or her views on disputed legal or political issues."

In your letter of February 9, 1998, you make reference to the previous Director's determination that discipline was not warranted as it regarded a fact situation involving this provision. As noted in that earlier determination, "the parallel provision of current ABA Model Code of

Judicial Conduct (1990 version) does not contain a blanket prohibition against announcing views on disputed issues. Instead, the current ABA provision prohibits 'statements that commit or appear to commit that candidate with respect to cases, controversies or issues that are likely to come before the court."

Along with that determination you received a list of cases addressing the issue of the ability of judges and judicial candidates to announce personal views on disputed issues. While you have indicated to us that you intend to speak at political party gatherings thus giving us enough information to give you an advisory opinion as to questions number 1 and number 2, you have not specified what statement you would make that may or may not be a view on a disputed, legal or political issue,. However, this portion of the Canon was not addressed by the recent amendments issued by the Minnesota Supreme court on Canon 5 on January 1, 1998. As such, the Director's Office continues to have significant doubts as to whether or not this provision would survive a facial challenge to its constitutionality under the First Amendment to the Untied States Constitution. Therefore, our policy has not changed and unless the speech at issue violates other prohibitions listed in Canon 5 or other portions of the Code of Judicial Conduct, it is our belief that this section is not, as written, constitutionally enforceable.

The facts upon which this opinion is based have been supplied by you. We are not responsible for the application of this opinion to differing factual situations. It should not be interpreted as binding the Minnesota

Supreme Court or the Lawyers Professional Responsibility Board in any future disciplinary proceeding arising out of this or any other matter. Moreover, this opinion is not intended to bind or influence any trial court or other adjudicatory body concerning related legal issues.

Sincerely yours,

/s/ Edward J. Cleary
Edward J. Cleary
Director

tt

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Affidavit of Gregory F. Wersal Filed February 27, 1998

Greg Wersal
For Supreme Court

[Picture Omitted In Printing]

> "If our laws are to reflect the will of a self governing people, then we need to elect judges who will strictly construe the Constitution."
>
> Gregory Wersal

A NEW LEADER FOR MINNESOTA

Greg Wersal
For Supreme Court

Examples of Judicial Activism by the Minnesota Supreme Court:

CRIME: The court ruled that a criminal has a legal right to a more lenient sentence than established in law by the legislature.

WELFARE: The court ordered the state to pay welfare benefits in excess of those provided for by the legislature. The legislature should set our spending policies; not judges.

ABORTION: The court ordered the state must use welfare funds to pay for an abortion despite state law to the contrary. The dissenting judge remarked the court "abandons all vestige of neutrality" in its pro-abortion stance.

Greg Wersal believes we need judges who will:

1. strictly construe the constitution
2. Not legislate from the bench
3. Punish criminals, not establish new rights.

Personal Background

- Raised on a family farm in Redwood Falls
- Graduate of St. Johns University, summa cum laude and Univ. Of Minnesota Law School, cum laude
- Private practice of law since 1980
- Married 14 years, 2 children
- Member, St. Joseph's Catholic Parish in New Hope and Calvary Lutheran Church in Golden Valley.

Contact Greg at (612) 546-3513

Prepared and paid for by CAMPAIGN FOR JUSTICE
7841 Wayzata Blvd., Ste. 201, Minneapolis, MN 55426.
(612) 546-3513

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For Supreme Court

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VOTE
WERSAL
SUPREME COURT

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE

Year after year citizens exercise their right to vote for a Legislature that will protect them from crime, provide for taxes, and spend the money in programs for citizens. The Minnesota Supreme Court has issued decisions which are marked by their disregard for the Legislature and a lack of common sense.

CRIME: In June, 1994, the Minnesota Supreme Court ruled that an in-custody confession must be tape recorded or it would not be allowed into evidence. What this means is that a murderer's confession to police will not be used against him if the police did not tape record it. Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?

WELFARE: In August, 1993, the Minnesota Supreme Court struck down, as a violation of the Constitutional right to travel, a state law that limited welfare benefits. The purpose of the law was to prevent people from moving to Minnesota only to collect the higher welfare benefits paid in this State. The Court should have deferred to the Legislature. It's the Legislature which should set our spending policies.

ABORTION: In January, 1996, the Minnesota Supreme Court ruled that a woman's right to privacy under the Minnesota Constitution means not only does she have a right to abortion, but that the State must use welfare funds to pay for it. This is directly contrary to the opinion of the U. S. Supreme Court. The idea that the State must pay for individuals to exercise their rights is almost unprecedented. The sole dissenting judge remarked the Court "abandons all vestige of neutrality" in its pro-abortion stance.

An Important Message From Greg Wersal

"This campaign is about creating a better future for ourselves, our children, and generations to follow. That's why I'm running for the Supreme Court, and that's why I need your support."

❒ **YES, Greg! I will support your campaign for the Supreme Court. Minnesota needs you on the Court. I want you to bring common sense and leadership to the Court. To further demonstrate my support for your candidacy, I've enclosed a campaign contribution in the amount of:**

❒ $25 ❒ $50 ❒ $100 ❒ $250 ❒ $500

❒ Other Amount $_____

❒ **Greg, I'd like to volunteer.**

A. I can distribute your campaign literature in my hometown.

B. I know a civic group that would like to hear you speak.

Contact me at _____

NAME

_____

PHONE

Make Checks Payable To
Campaign For Justice
7841 Wayzata Blvd.
Suite 201
Minneapolis, MN 55426

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE

Prepared and paid for by Campaign For Justice.
(612) 546-3513

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Affidavit of Gregory F. Wersal Filed February 27, 1998

Wersal Law Office, P.A.

[Address Omitted In Printing]

August 15, 1997

Dear Member of the Constitution Committee
of the Republican Party:

I have been provided with a copy of the letter from G. Barry Anderson to Chris Georgacas dated May 24, 1996. A copy of the letter is attached. I have been asked to respond to this letter. I will set out the various arguments presented in the letter by Mr. Anderson an my response.

1. Argument: The Code of Judicial Conduct prohibits a judicial candidate from *personally* soliciting publicly stated support.

   Response: Mr. Anderson only quotes part of Canon 5B(2). It is true that a *judicial candidate* can not ask for an endorsement; but the candidate's campaign committee can. Canon 5B(2) states, "Such committees may solicit and accept campaign contributions . . . and obtain public statements of support for his or her candidacy". The Office of Lawyers Professional Responsibility which is charged with prosecuting attorneys for ethical violations agrees with this interpretation. (Please see the Determination that Discipline is Not Warranted which is attached.)

2. Argument: The Code prohibits a candidate from attending political gatherings and, although there is an exception for a candidate to "speak at gathering"

there is no language specifically allowing a candidate to speak at "political gatherings". Had the Supreme Court intended such an exception to exist it could have clearly stated it.

Response A: It has been some time since I studied logic, but this is a classic form of a fallacious argument. Mr. Anderson is trying to prove a point by what was *not* said rather than what was. You can not prove a proposition by a negative.

But what the code does say is that a judicial candidate may speak on his own behalf at "gatherings". The word "gatherings" is more general than "political gatherings" and should be interpreted to include a wide variety of gatherings such as union meetings and candidate forums as well as political gatherings. The Code should then be interpreted to say that a judicial candidate may not attend political gatherings except that he may attend any type of gathering, including political, to speak on his own behalf. This is the interpretation which was adopted by the Office of Lawyers Professional Responsibility. (Again, please see this decision which is attached.)

Response B: It is a rule of interpretation or construction that you should not interpret a rule in such a way as to render part of its language meaningless. Mr. Anderson wants to interpret Canon 5A(1) to state a judicial candidate can never attend political gatherings. Yet Canon 5A(1) clearly states "Except as authorized in 5B(1)". This language must have some meaning. There must be some exception in 5B(1) to the general rule of 5A(1). That exception is that a candidate may speak at gatherings on his own behalf.

Response C: Mr. Anderson's argument ignores history. the Code prior to January 1, 1996 stated a judicial candidate could not "attend political gatherings", Canon 7A(1)(c). It also said that a candidate "may

accept invitations to attend and speak on his or her own behalf at other than partisan political gatherings", Canon 7A(2). This language was changed on January 1, 1996 to state that a candidate "may speak at gatherings on his or her own behalf", Canon 5B(1)(a). If you wish to apply Mr. Anderson's reasoning process, then apply it to the facts. The Supreme Court knew exactly how to say that judicial candidates could speak except at partisan political gatherings because that is what the code said prior to January 1, 1996. The court changed that language and changed it for a purpose by eliminating "at other than partisan political gatherings". The clear purpose of the change is to allow candidates to speak on their behalf at all type of gatherings including political gatherings.

3. Argument: Because it is not clear if the restrictions placed on the free speech of judicial candidates are constitutional, the Republican Party may become involved in litigation if it endorses a judicial candidate.

   Response: The argument confuses the free speech rights of the Republican Party to endorse candidates (which is clear), with the free speech rights of a judicial candidate to speak on various issues (which is not clear). As a practical matter, the Code allows judicial candidates to discuss their judicial philosophy, such as whether they believe in the strict interpretation of the Constitution, and to criticize prior court decisions. I believe that I am able to effectively get out a message without violating even the most restrictive interpretation of the Code. Again, I would refer you to the Decision of the Office of Lawyers Professional Responsibility which discusses whether I violated the Code by announcing views of disputed legal or political issues and concludes that I did not.

If any member of the Committee would like me to answer any further questions I would be most willing to do so.

Yours truly,

WERSAL LAW OFFICE, P.A.

/s/ Gregory F. Wersal
Gregory F. Wersal

GFW/gg
Enclosure

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Affidavit of Gregory F. Wersal Filed March 26, 1998

STATE OF MINNESOTA) Affidavit of
ss.
COUNTY OF HENNEPIN) Gregory Wersal

Gregory Wersal having been duly sworn under oath states as follows:

1) I am an attorney licensed to practice law in the State of Minnesota and was a candidate for Associate Justice to the Minnesota Supreme Court in 1996 and am currently a candidate for Associate Justice to the Minnesota Supreme Court for in 1998.

2) During the course of my campaigns, and previous to the most recent changes in the Code of Judicial Conduct by the Minnesota Supreme Court, I spoke at numerous political party gatherings.

3) On April 26, 1996, I attended the Third Congressional District Republican Party Convention. After my speech Mr. Michael Bolen approached me. Mr. Bolen was visibly upset, angry, and began yelling at me that I had violated ethical rules for judicial candidates and that he intended to file an ethical complaint against me. I was shocked at Mr. Bolen's aggressive behavior, as were some other convention attendees who intervened and defused the situation.

4) In May, 1996, an ethical complaint was filed against me with the Office of Lawyers Professional Responsibility arguing that I had violated the rules of ethical conduct for judicial candidates by my attendance

at the Third Congressional District Republican Convention. On June 13, 1996, the Office of Lawyers Professional Responsibility determined that sanctions against me were not warranted.

5) In July 1996, I spoke at the State Convention of the Republican Party of Minnesota. At that convention, Michael Bolen stood and announced to the 2,000-3,000 delegates that were attending that I was violating ethical rules for conduct of judicial candidates and that he would file a complaint against me with the Office of Lawyers Professional Responsibility. Many of the delegates were upset by these allegations and numerous people asked me to explain my position. Many delegates told me that they did not want the Republican Party involved in a legal dispute and did not want to be part of any candidate's ethical violations.

6) Shortly after this convention, I withdrew as candidate for Associate Justice as a result of the Complaint which had been filed against me at the Office of Lawyers Professional Responsibility and the risk that further complaints would be filed against me and thereby jeopardize my ability to practice law.

7) In January of 1997 I announced my intention to be a candidate for Associate Justice in the primary and general elections of 1998.

8) On April 25, 1997, Michael Bolen interrupted the Third Congressional District Republican Convention when I was called to the podium to speak. Mr. Bolen denounced my actions as unethical and again stated his intention to file an ethical complaint against me. The Chair of the Convention ruled that Mr. Bolen was out of order and asked Mr. Bolen several times to cease his protest before I could finally speak. Again I began to have fears about whether I could

conduct a campaign with the constant threat of possible ethical complaints.

9) Upon information and belief, between May and September of 1997, Mr. Bolen attended meetings of the Republican Party Constitution Committee where he argued that the Republican Party should change its Party Constitution to prevent the Party from endorsing judicial candidates.

10) Upon information and belief, in February of 1998, Michael Bolen contacted the Republican Party and asked them not to join me in the current law suit before this court.

11) Upon information and belief, unknown third persons have distributed photocopies of my campaign literature at some of the Republican Conventions which occurred between March 14-21, 1998. And upon information and belief, individuals have spoken at some of these conventions supporting my candidacy, though I have asked them not to speak on my behalf for fear of ethical complaints. That over the next three weekends 71 additional Republican Party County and Senate District Conventions will be held. I already know that there are individuals who intend to attend these conventions, as well as other Republican Party gatherings, and speak on behalf of my candidacy despite the fact that I have asked them repeatedly not to.

12) That I fear Mr. Michael Bolen and others who wish to derail my campaign by filing ethical complaints will do so when they see individuals attending the numerous conventions who speak on my behalf and who distribute photocopies of my literature announcing my views on disputed political or legal issues.

13) Upon information and belief, in mid-March 1998, Michael Bolen contacted the Fifth District Republican Office to investigate my background with the Republican Party, including whether I had been a precinct chair, or attended caucus meetings as far back as 1996. I believe that this investigation by Mr. Bolen is a prelude to his filing ethical complaints against me, as he has said he would do on numerous occasions.

14) I feel that these ethical complaints will consume an inordinate amount of time which I must take away from my law practice and will put my very livelihood in jeopardy.

3-26-98
Date

/s/ Gregory F. Wersal
Gregory F. Wersal

Subscribed and sworn to before me
this 26th day of March, 1998.

/s/ Mark E. Wersal

[SEAL] MARK E. WERSAL
NOTARY PUBLIC MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 27

MINNESOTA BOARD ON JUDICIAL STANDARDS
[Address and Names Omitted In Printing]

July, 1998

RE: 1998 Judicial Election

Dear Judicial Candidate:

The board on Judicial Standards has requested that I forward to you a brief summary of questions that have been asked of the Board from time to time concerning election conduct. We are enclosing a brief summary of judicial election practices and a brief synopsis of the formal opinions rendered in past years by the Board.

The Code of Judicial Conduct can be found in *1998 Minnesota Rules of Court* starting on page 837. Canon 5 (page 847) is the section of the code which deals with the campaign conduct of a judicial candidate. It was clarified by the Supreme Court effective January 1, 1998. We call your attention to two other provisions of Minnesota Law; Fair Campaign Practices Act, MS 211B and Ethical Practices, MS 10A.

The American Judicature Society has published a book entitled, *"Electing Justice: The Law and Ethics of Judicial*

Election Campaigns." by Patrick M. McFadden. We have enclosed a copy.

Minnesota CLE, Minnesota Board on Judicial Standards and Minnesota Supreme Court's Office of Continuing Legal Education for State Court Personnel are planing a workshop, "How To Run A Judicial Campaign" for Saturday, August 1, 1998. Enclosed is the flyer with the detailed information.

If you have any questions, please feel free to contact this office.

Sincerely,

/s/ DePaul Willette
DePaul Willette
Executive Secretary

Enc.

MINNESOTA BOARD ON JUDICIAL STANDARDS

Judicial Election Practices

The Code of Judicial Conduct adopted by the Supreme Court in 1976 and Canon 5 of the code, which was further clarified by the Supreme Court on January 1, 1998, governs the election of any candidate for judicial office. The Code of Judicial Conduct is published in *Minnesota Rules of Court, 1998*, page 837.

During the election years, the Board has received questions from incumbent judges and attorneys who have

filed for judgeships (candidates) regarding campaign conduct. The following are some of the responses to inquiries the Board has received.

1. The Code of Judicial Conduct applies to all candidates for judicial positions including the challenger and the incumbent judge.

2. The Board on Judicial Standards has jurisdiction to discipline incumbent judges for election conduct violations. The Lawyers Professional Responsibility Board has the responsibility to impose discipline on attorneys as candidates for judicial position who violate the code on Judicial Conduct (Rule 8.2, Rules of Professional Conduct). If the non-incumbent candidate is successful in the election, then the responsibility for disciplining election conduct violations is the responsibility of the board on Judicial Standards.

3. Responsibilities of candidates to comply with the code on Judicial Conduct in election matters commences when the candidate announces that he or she is seeking a judicial position.

4. The candidates election speech is limited by Canon 5A(3)(d). It reads as follows:

"(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues: or misrepresent his or her identity, qualifications, present position, or other fact, or those of the opponent; and

(ii) by words or conduct manifest bias or prejudice inappropriate to judicial office."

5. The candidate can not solicit campaign funds directly but must do this through the establishment of a committee. The candidate can not use campaign contributions for his or her or family members benefit.

6. A candidate should maintain the dignity appropriate to the judicial office and encourage members of their family to the same standards.

7. A candidate should not use courthouse personnel or employees under their direction or control for campaign purposes.

8. A candidate should not have their election materials in the courthouse for public distribution.

9. A candidate should refrain from comment on a judge's handling of any case that is presently pending on appeal or within the time of appeal.

10. Candidates are not to participate in political activities nor seek or use political endorsements under Canon 5A(1)(a) and Canon 5A(1)(d).

There is also attached to this Memorandum a summary of formal private opinions issued by the Board on Judicial Standards in the past.

Any questions regarding the election practices in judicial contests may be referred to:

Board on Judicial Standards
2025 Centre Pointe Boulevard
Suite 420
Mendota Heights, MN 55120
Telephone (612) #296-3999

Depaul Willette March, 1998
Executive Secretary
Board on Judicial Standards

BOARD ON JUDICIAL STANDARDS

Election Opinions

8/23/70 It is permissible for a judge running for reelection to be pictured on campaign material in the judge's robe.

7/24/80 A candidate running for judicial office may campaign door to door, display posters in businesses and public places and send out letters to voters with the candidate's history and qualifications.

Candidate is personally responsible for the truth and propriety of all campaign materials and activities.

9/22/80 A candidate running against an incumbent judge can not compel the judge to respond to a candidate's "statement of facts."

8/14/84 A judge, in the same district as a judicial candidate running for reelection, may comment when an inquiry is made by a news media on the judicial candidate's qualifications and court activities.

It is a violation of the canon for the judge to make an election contribution to the judge or the judge's registered campaign committee.

9/3/86 It is inappropriate for a judicial officer (referee) to be pictured wearing a judge's robe and using the title "Judge."

8/18/88 Judges' election filing fee may not be paid by the judge's campaign fund

10/10/90 In all election contests, a candidate for judicial office may discuss decisions and opinions of the Appellate courts.

[LOGO] Minnesota State Bar Association | Continuing Legal Education

[Address and Phone Number Omitted in Printing]

June 1, 1998

Minnesota CLE, the Minnesota Board on Judicial Standards, and the Minnesota Supreme Court Office of Continuing Education for State Court Personnel invite you to participate in the

Judicial Campaign Law and Ethics

Saturday, August 1, 1998
Suite 230, Judicial Center
25 Constitution Avenue • Saint Paul

Dear Judges, Judicial Candidates, and Campaign Staff:

This is your opportunity to reserve your place in the **Judicial Campaign Law and Ethics Workshop**. The workshop offers what you *need to know* to comply with the

rules, codes and laws governing judicial campaign practices. The workshop further offers practical tips on how to organize and run your campaign from beginning to end, with a special emphasis on fulfilling ethical requirements.

Our distinguished faculty include Cynthia Gray – National Expert on Judicial Campaign Law and Director of the American Judicature Society in Chicago, Illinois; Honorable Bruce D. Willis; Robert M.A. Johnson; Joseph Mansky; Gary Goldsmith; and DePaul D. Willette.

In addition to giving presentations, they want to answer your specific questions about anticipated problems and problems that have arisen during past campaigns. Bring any past campaign literature and advertising pieces for display and analysis.

Agenda

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* * * a.m. Registration and continental Breakfast

* * * a.m. **AN OVERVIEW OF ELECTION LAW AND ETHICS.** An overview of the rules, codes and laws that shape campaign activity. This includes an analysis of Canon 5 of the Code of Judicial Conduct, which governs campaign practices.
– DePaul D. Willette

* * * -10:30 a.m. **HOW TO ORGANIZE A CAMPAIGN.** A discussion of the legal requirements for setting up a campaign committee, filing for office, and registration and reporting; also, a look at the role of the

Campaign Finance and Public Disclosure Board, obtaining advisory opinions and what to do with them, and an overview of recent advisory opinions.
– Honorable Bruce D. Willis and Gary Goldsmith

10:30-10:45 a.m. Questions and Answers/Panel Discussion

10:45-11:00 a.m. Break

11:00-11:30 a.m. **ELECTION DAY AND POST-ELECTION CONCERNS.** A look at the election process, the role of the Secretary of State's Office, how recounts work and reporting requirements.
– Joseph Mansky

11:30-11:45 a.m. Questions and Answers/Panel Discussion

11:45-1:00 p.m. Lunch (included with your registration)

1:00-2:30 p.m. **CAMPAIGN ACTIVITIES.** A summary of the legal and ethical requirements and limitations for campaign advertising, literature, and endorsements; including discussion of the Fair Campaign Practices Act and campaign candidate speech.
– Cynthia Gray and Robert M.A. Johnson

2:30-2:45 p.m. Questions and Answers/Panel Discussion

2:45-3:45 p.m. **FUND RAISING.** An overview of legal and ethical requirements and limitations in fundraising.
– Cynthia Gray, Honorable Bruce D. Willis, and DePaul D. Willette

3:45-4:00 p.m. Questions and Answers/Panel Discussion

Faculty & Planners

Cynthia Gray
Director
American Judicature Society
Center for Judicial Conduct Organizations
Chicago, Illinois

Gary Goldsmith
Assistant Executive Director Campaign Finance & Public Disclosure Board
Saint Paul

Michael Johnson
Staff Attorney
Research and Planning
State Court Administration
Saint Paul

Robert M.A. Johnson
Anoka County Attorney
Anoka

Joseph Mansky
Director
Election Division, Office of the Secretary of State
Saint Paul

Alanna K. Moravetz
Director
Supreme Court Office of Continuing Education
Saint Paul

DePaul D. Willette
Executive Secretary
Minnesota Board on Judicial Standards
Mendota Heights

Honorable Bruce D. Willis
Judge, Minnesota Court of Appeals
Saint Paul

Credits: Minnesota CLE has applied for 5.0 hours CLE credit and 5.0 hours continuing judicial education credit. Additionally, we have applied for 1.5 of those hours to count towards continuing *ethics* education credit.

Information: If you have any questions or need further information, please call Minnesota CLE at (612) 227-8266 or (800) 759-8840

Accommodation: If you have a disability and need an accommodation in order to attend this seminar, please contact us as soon as possible or at least one week in advance of the program. For further information or assistance please contact Minnesota CLE, 40 Milton Street North, Suite 174, Saint Paul, MN 55104-7094 or call (612) 227-8266 or (800) 759-8840.

No-Show Policy: Paid registrants who fail to attend will receive the written materials. Passholders may purchase the course materials at 50% of the full retail price.

Cancellation Policy: Paid registrants who cancel their registration at least 72 hours before the program will receive a full credit on their account; if fewer than 72 hours, a $25 administrative fee will be deducted.

REGISTRATION/ORDER FORM 98-02.01JC

Judicial Campaign Law and Ethics

Saturday August 1, 1998
Suite 230, Judicial Center • 25 Constitution Avenue • Saint Paul

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Cost is $50 per person.

Enclosed is $___ by: [ ] Check [ ] Visa
[ ] Discover [ ] MasterCard
[ ] Am. Express

Card No. _____ Exp. _____

Signature _____

Program Materials: I am unable to attend. Please send me ___ copy(ies) of program written materials at $50.00 each. Materials will be available after August 1, 1998.

[ ] I have a Minnesota CLE Season Pass℠. Pass #___
[ ] *Check here if address below is new.*

Name (first) (mi) (last) _____
Firm _____
Address _____
City/State/Zip _____
Phone _____ Fax _____
Attorney License No. (if applicable) _____
Profession, if non-attorney _____

MAIL TO: Minnesota CLE, 40 Milton St. N, #174, St. Paul, MN 55104-7094

QUESTIONS? Call (612) 227-8266 or (800) 759-8840.

AMERICAN JUDICATURE SOCIETY

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Studies of the Justice System

Electing Justice:
The Law and Ethics of
Judicial Election
Campaigns

Patrick M. McFadden

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 29

Minnesota Board on Judicial Standards

Memorandum

TO: 1998 JUDICIAL CANDIDATES

FROM: DePaul Willette, Executive Secretary

DATE: August 20, 1998

RE: Judicial Election Materials

It has come to my attention that the summary of Board opinion 8/14/84, sent to you as part of our election material, is confusing. I agree. I am forwarding the re-edited version for your records. Please discard the former handout.

Thank you. DePaul

BOARD ON JUDICIAL STANDARDS

Election Options

8/23/70 It is permissible for a judge running for reelection to be pictured on campaign material in the judge's robe.

7/24/80 A candidate running for judicial office may campaign door to door, display posters in businesses and public places and send out

letters to voters with the candidate's history and qualifications.

Candidate is personally responsible for the truth and propriety of all campaign materials and activities.

9/22/80 A candidate running against an incumbent judge can not compel the judge to respond to a candidate's "statement of facts."

8/14/84 A judge, in the same district as a judicial candidate running for reelection, may comment when an inquiry is made by a news media on the judicial candidate's qualifications and court activities.

It is a violation of the canon for a judge to make an election contribution to another judge or to another judge's registered campaign committee.

9/3/86 It is inappropriate for a judicial officer (referee) to be pictured wearing a judge's robe and using the title "Judge."

8/18/88 Judges' election filing fee may not be paid by the judge's campaign fund.

10/10/90 In all election contests, a candidate for judicial office may discuss decisions and opinions of the Appellate Courts.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 37

Wersal Law Office, P.A.
[Address Omitted In Printing]

February 10, 1998

Dear Editor:

I am writing to you to bring to your attention the recent Order of the Minnesota Supreme Court which will drastically change the way judicial election campaigns are conducted throughout the state of Minnesota. This action by the Supreme Court also raises serious questions of an abuse of power by our Supreme Court when it muzzles its opponents from speaking in free and open elections and when it assumes a function that belongs to the Legislature in determining how judicial campaigns are to be conducted. Finally, it raises questions about what is left of democracy in judicial elections.

The Order of the Supreme Court, a copy of which is attached, does the following:

1) It prohibits judicial candidates from speaking in their own behalf at political party gatherings (an accepted practice prior to this change of Canon 5 of the Code of Judicial Conduct).

2) It prohibits the judicial candidate's campaign committee from seeking, accepting, or using the endorsement of a political party (prior to this change in Canon 5, the

campaign committee of a judicial candidate could seek the endorsement of *any group*, including a political party).

3) It prohibits judicial candidates from announcing their views on disputed legal and political issues (several Federal District Courts have found similar language an unconstitutional infringement of free speech).

It is true that as a candidate for the Minnesota Supreme Court, I have my own axe to grind. So I will begin to grind that axe by giving you some history. I began a campaign for the Minnesota Supreme Court in January 1996, frequently speaking to political party groups. Ethical complaints were filed against me arguing that a judicial candidate should not talk to political parties. I won all of these complaints (see attached Determination that Discipline is Not Warranted). When my campaign committee was unable to get the endorsement of the Republican Party, I decided not to file for office for the elections in 1996. Please understand that the Republican Party had never endorsed a judicial candidate before.

Throughout 1997, I again campaigned and spoke at political party conventions and meetings as a candidate for the elections to be held in 1998. My campaign has had some success. In the Fall of 1997 the Republican Party instructed their Search Committee to include in their search for candidates to endorse, judicial candidates for statewide offices.

Shortly thereafter, the Minnesota Supreme Court held a hearing to change the Code of Judicial Conduct and in fact did so. Prior to the adopting of the changes, a hearing was held before the Supreme Court at which I asked all of the Justices who were to stand for election in 1998

to recuse themselves. None of them did. Justice Page, Justice Gardebring, and Justice Tomljanovich all participated in a decision, the only effect of which was to stop their potential opponent's ongoing campaign. Judges are to avoid even the appearance of impropriety. In fact, one provision of the Code of Judicial Conduct states that a judge should disqualify himself where "the judge knows that he or she has an interest that *could be* substantially affected by the outcome of the proceeding."

You may not agree that a judicial candidate should speak at political gatherings. You may find this idea unseemly. But is it fair to change the rules in the midst of an election cycle? Or is it fair for a sitting judge to decide how his opponent may campaign? And finally, one may question the property of sitting judges determining how judicial campaigns may be run when the Minnesota Constitution says that judicial elections are to be conducted in a manner determined by the Legislature.

If we want judicial candidates to be pure and unaffected by outside influences, why allow them to be endorsed by groups or individuals other than political parties? If a candidate is endorsed by the NRA or Planned Parenthood or any other single issue group, isn't that even more of a problem? The original rule change requested by the Board on Judicial Standards would have applied to such groups, but the rule as finally adopted by the Supreme Court was limited to political party groups. Do you think this is a mere coincidence?

The real question is what remains of judicial elections when opponents to judicial incumbents are prevented

from speaking? And what remains of democracy when it is the incumbent judges who have created these rules?

I hope you will look at this issue and discuss it in your newspaper. If you have any questions please feel free to call met at (612) 546-3515 or cell phone (612) 701-9623.

Yours truly,

Gregory F. Wersal
Candidate for MN Supreme Court Justice

GFW/bmh
Enclosures

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 61

FRIDAY, JUNE 12, 1998

Star Tribune Editorial

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opinion@startribune.com

Political Candidate Wersal misleads voters in describing elections

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Counterpoint

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* * *

[Copy Illegible From Courts Below]

genuine public policy debate in these pages. I know from personal experience that Wersal's latest statement that the rules silence him is simply wrong.

In 1996 I was a candidate for a Hennepin County judgeship. I lost, but not for want of frank and open discussion. I had many interesting conversations with voters about how judging in Hennepin County has become less a matter of weighing lofty legal principles and more a matter of managing large groups of people exhibiting difficult social problems: drug abuse, domestic violence, juvenile delinquency, drunken driving, unpaid child support. I answered questions from reporters and

editorial writers about the effectiveness of criminal sentencing and how to reduce the high cost of divorce. At candidate forums I responded to questions about what to do about juvenile court proceedings and the importance of diversity on the bench. The campaign rules never provided the slightest restriction on saying anything of importance.

What Canon 5 of the Minnesota Code of Judicial Conduct does prohibit is a judicial candidate "announcing his or her views on disputed legal or political issues." This restriction immediately follows a prohibition against making "promises of conduct in office other than the faithful and impartial performance of the duties of the office." Both rules have the same purpose – to keep judicial elections from becoming referendums on hot social issues. Whether or not these restrictions are ultimately found unconstitutional, it would do voters a disservice to focus a campaign on controversial social issues like abortion and sexual preference.

To begin with, controversial social issues are only a tiny fraction of the judiciary's workload. More important, when any such issue does reach the court, a judge is expected to put his or her personal opinions aside. Good judges take their guidance from a study of the law, and they then apply the law fairly and impartially to the individual case before them. Each case has its own particular set of facts and its own unique procedural history which may cause an open minded judge to decide similar cases differently based on the same body of law. A judicial candidate who thinks that his opinion in the abstract about a disputed issue is terribly important is practically announcing his lack of judicial temperament.

There is a place for candidates who want to promote their personal views on disputed issues. That place is the Minnesota Legislature, not the Supreme Court.

So let's not let Wersal get away with pretending he can't talk. Let's ask him his ideas about the judiciary's role in managing social problems. Let's ask him how we can keep exorbitant legal fees from barring even average citizens, not to mention the poor, from equal access to the means of justice. Let's ask him whether he thinks large damage awards promote economic efficiency.

And most important, let's ask Wersal – and all this season's judicial candidates – the crucial personal questions: How have they demonstrated the open-mindedness, good judgment and appreciation of people from all walks of life that qualify them to be a judge? How have they exhibited the qualities of leadership expected of a Minnesota Supreme Court justice?

Minnesota has been blessed with many outstanding Supreme Court justices. It's a position reserved for people who answer hard questions, not avoid them.

– Bruce A. Peterson, Minneapolis Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 73

Announcement Against Alan Page
July 7, 1998

Good Afternoon. I am pleased to announce that at 8:00 o'clock today I filed for the office of Justice to the Minnesota Supreme Court against Alan Page.

I am running for this office for one reason – we must restore democracy to our courts. To have democracy you must have free political speech and free and open elections; right now we have neither.

At the beginning of this year, we all thought there would be 3 elections for judges on the Supreme Court. We are now down to one seat that's left. First Ester Tomljanovich resigned. And then Sandra Gardebring resigned only 6 business days before opponents could file for the office with the Secretary of State. By their deliberate actions, each of these judges stole an election from the people of Minnesota; because by their resignations, the Governor has appointed people to positions that should have been open to election.

But stealing elections is nothing new to our courts. The judges on our Supreme Court have created a web of rules called Canon 5 which steal elections everyday. These rules prohibit judicial candidates from discussing legal issues or even criticizing a judge's decisions. Imagine a lawyer who can't talk about the law and you will

begin to understand the problem with Canon 5. And these rules really do exist. And so year after year, election after election, you and I are told to exercise our constitutional rights and vote for a judge when we have been denied the most basic information we need to make a decision. These elections have all been stolen.

So why run against Alan Page – after all, he was actually elected to office, not appointed, and isn't it elections that I'm fighting for? The reason is that Alan Page was there in the Ivory Tower when so many decisions were made that keep us from having real elections; and he did nothing. And because he was elected, don't we as voters have a right to expect more from him than from the judges who were appointed? In 1994, a blue ribbon committee appointed by the Supreme Court told the Supreme Court that the rules restricting judicial campaigns must be changed. Where was Alan Page? Was he there fighting to change Canon 5 and to open up judicial elections? No, he was in the Ivory Tower, and he did nothing. And in 1995 when the Board on Judicial Standards recommended changes that would allow candidates to criticize a judge's decisions, where was Alan Page? He was in the Ivory Tower with all the judges who had been appointed, apparently comfortable in his belief that he'd never have to worry about anyone criticizing his decisions.

But worst of all, in 1996, the citizens of Minnesota passed a Constitutional Amendment calling for the establishment of recall elections for all public offices, including judges. There is only one problem with the law; the law directs the Supreme Court to establish what would be sufficient grounds for a judge to be recalled. And now,

almost 2 years later the Supreme Court has yet to establish even one ground for the recall of a judge. What is the matter, can't that crowd at the Supreme Court think of any reason that a judge should be recalled? Any reason at all? How about the commission of a felony? How long are we going to have to wait? Until the Supreme Court acts, the citizens of Minnesota are denied there [sic] constitutional right to elections to recall judges from office. And during this 2 years, where was Alan Page? He was in the Ivory Tower.

You see these judges in the Ivory Tower don't want real general elections. They don't want recall elections. And for heavens sake, they don't want accountability.

Ladies and gentlemen, if you accountability, then we must eliminate the rules that prevent a candidate from even criticizing a judge's decision. If you want real elections, then candidates must be able to talk about more than why they cannot talk. So this November I will ask you and all the people of Minnesota to vote for Greg Wersal, though the Minnesota Supreme Court, with all its rules and prohibitions, won't let me give you one good reason to do so.

/s/ Greg Wersal
Greg Wersal

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 77

Wersal Law Office, P.A.

[Address Omitted In Printing]

Letters to the Editor

Dear Editor:

Below is a commentary I hope you will consider using in your paper. Because the subject includes some serious allegations, I have attached copies of the supporting documents. If you have any questions, please call me.

/s/ Greg Wersal
Greg Wersal

When Justice Is Not Blind

Supreme Court Justice Alan Page needs to explain his conduct to the voters. An ethical complaint filed August 19, 1998 with the Minnesota Board on Judicial Standards states that Page sat and decided cases involving contributors to Page's charitable foundation. This doesn't look good – in fact, it smells.

Page established the Page Education Foundation in 1988 to provide scholarships to minority students who wished to go to college. The foundation's purposes are laudable. Contributors to the foundation include many major Minnesota corporations, or their foundations, and large Minnesota law firms.

But there is a problem when these same corporations and law firms later have cases in front of the Minnesota Supreme Court and Alan Page sits on these cases as a judge. Every one wants to know that when they appear in front of a judge that the playing field is level – but it is hard to have confidence in the impartiality of the judge if your opponent has given thousands of dollars to the judge's favorite charity. And that's exactly what happened here.

Page may want to argue that he didn't know who the contributors were. But that just won't wash. The contributors and the amounts given are detailed in tax documents signed by Alan Page and filed with the Charities Division of the Attorney General. And right above Page's signature is the phrase, "Under the penalty of perjury, I declare that I have examined this return . . . and to the best of my knowledge it is true, correct, and complete." Nor can Page say that he separated himself from knowledge of who the contributors were after he took office as a Supreme Court justice in January of 1993. Page signed tax forms under the penalty of perjury on 11-14-94 and again on 11-15-95 that listed corporate contributors such as The Saint Paul Companies ($20,000), Colwes Media Foundation ($45,00), Honeywell Foundation ($10,000), and the law firm of Robins, Kaplan, Miller & Ciresi ($5,000). And later Page participated and decided cases cases [sic] before the Supreme Court involving The Saint Paul Companies, Colwes Media and Honeywell and in which the Robins law firm represented a party.

It gets even worse. Contributions to the foundation have soared since Page became a Supreme Court justice. Hundreds of thousands of dollars now flow into the

foundation from contributors each year. In 1997 contributions totaled $888,000 – whereas the contributions averaged only $126,000/year for the four years before Page was on the Supreme Court.

It's impossible to avoid asking whether Alan Page was actually influenced? Who knows? But that's really not the point. We should never have to ask these questions of a judge in the first place. We should never have to ask if justice is truly blind.

/s/ Greg Wersal
Greg Wersal

Greg Wersal is a candidate for the Minnesota Supreme Court against Alan Page.

Why can't the Supreme Court get it right

Those who have criticized my campaign for the Minnesota Supreme Court, such as Bruch Peterson, either fail to understand, or perhaps don't care, about democracy. In a democracy, the voters need to be able to make informed decisions to choose their leaders. But in a recent survey, 86% of voters said they needed more information about judicial candidates to make a decision. The rules created by the Minnesota Supreme Court (Canon 5) gag judicial candidates and deprive voters of the information they need. Anyone who says otherwise needs to wake up and smell the coffee.

Some try to argue that my ideas are radical and will undermine the system of judicial selection. How radical can I be when so many other legal establishment groups

agree with me? Years ago, the American Bar Association recommended that the rule, prohibiting judicial candidates from "announcing their views on disputed legal and political issues", be eliminated from judicial codes because it was an unconstitutional infringement of free speech. The Minnesota Supreme Court established a blue ribbon commission to study the issue and they recommended the same change for the same reason in 1994. The Board on Judicial Standards supported the recommendation. The Lawyers Board of Professional Responsibility doubts the constitutionality of the "announce" clause and has refused to enforce it. The Minnesota State Bar Association is currently asking its members for permission to petition the Supreme Court to eliminate the clause. So you see my ideas are far from radical; in fact, they are mainstream.

The only difference between me and these groups is that when the Minnesota Supreme Court ignored their recommendations they did nothing about it. I've decided to fight for the right of the people of Minnesota to have free and open elections and choose their judges.

Not all legal groups agree. In my research I found two groups that argued against the change proposed by that blue ribbon commission. The first was the Minnesota Conference of Chief Judges. The second was the Minnesota District Judges Association. Surprise! Surprise!

The "announce" clause is so restrictive, it's virtually impossible for a candidate to criticize the legal policy established by his opponent. Of

* * *

One Refuses To Speak; Others Are Forbidden To Speak

In April of this year, the Minnesota Supreme Court set a new policy in a criminal law. The Court decided that the Fourth Amendment to the Constitution, which protects citizens from unreasonable searches and seizures, included a protection against a search of a suspect's mouth.

The police, investigating a burglary, approached and asked two men what they were doing. Knowing that it was common for drug dealers to conceal narcotics in their mouths, the officers noticed that one of the men would respond to their questions only by nodding his head. The officers knew that in this area there was a great deal of drug trafficking. When the officer saw that the man was trying to swallow something, he asked the man to open his mouth. Instead the man tried to flee, was subdued through the use of mace, and eventually spit out 2.6 grams of crack cocaine.

When the case was heard by the Minnesota Court of Appeals, they stated, "The Fourth Amendment protects only against governmental invasion of a privacy interest that society recognizes as reasonable. . . . A person has no legitimate expectation of privacy in the fact that his mouth is so crammed with some substance that he is not even able to talk."

On appeal, the Minnesota Supreme Court ruled that the policeman's request for the suspect to open his mouth constituted an illegal search and that the drugs must be excluded from evidence. As there was no other evidence,

the case was dismissed. This new policy creates a question of whether the police can do anything when suspects hide items in their mouths.

So here we have the Court of Appeals and the Minnesota Supreme Court, both applying their concept of society's expectations of privacy and coming to opposite conclusions. Which of them is correct? Some argue that the fourth Amendment is such a complicated, arcane and specialized issue that the average person can't tell which of them is correct? Others believe that members of society have a right to decide what authority the police should have to invade a citizen's privacy. And if citizens have legitimate opinions about the the [sic] power of government to control their lives, then these are the types of issues that should be discussed when we choose judges in elections.

The problem is that these issues are never discussed. They can't be discussed. The Minnesota Supreme Court in 1995 and again on January 1, 1998, adopted another set of policies in the form of ethical rules that judicial candidates must follow. Among these is a rule that judicial candidates cannot state their views on a disputed legal or political issue. This means that a judicial candidate cannot discuss his views on whether a search, such as in this case, was an invasion of a reasonable privacy interest. A lawyer who violates this rule could have his license to practice law taken away for unethical conduct.

I fail to see why the promotion of ignorance should be treated as a virtue. Prohibiting a judicial candidate from stating his opinion about issues doesn't mean that the candidate doesn't have opinions. It simply means that

the voters don't know what they are. What an insane way a conduct an election. You might as well have the competing candidates draw lots.

Worse yet, if issues can't be discussed, the whole purpose of elections is lost. You either believe that citizens have a right to control government encroachment in their lives, or you don't. You either believe in the ability of people to govern themselves, or you don't. You either believe in free and open elections, or you don't.

Oddly we now have a situation where a criminal is protected from governmental interference when he sticks an item in his mouth, but a judicial candidate doesn't have the same protection for the words that come out of his mouth.

Greg Wersal

Greg Wersal, a Golden Valley lawyer, is a candidate for the Minnesota Supreme Court.

Court Policies Need Citizen Review

Most people have the impression that our courts simply apply the law given to them by the Legislature. This impression is wrong; our courts create and set policies. And it is as policy makers that judges need to intermittently submit to elections to determine if they still deserve the public trust.

For example, the Minnesota Supreme Court has created and set a policy that custodial confessions made by suspects to the police must be tape recorded. If the police

fail to comply with this recording requirement, the confession will be suppressèd as evidence at trial. This means the police will not be allowed to testify, and the jury will not hear, "the suspect told me. . . . "

This policy was adopted in 1994. With this new policy, evidence that had been allowed into Minnesota courts for decades is now invalid. And the Court said it did not decide on this policy because it felt compelled to do so by the Constitution; nor because of some law passed by the Legislature. Rather the Court set this policy, in its own words, "in the exercise of [its] supervisory power to insure the fair administration of justice." The Court clearly was creating and setting policy.

Well, one person's sense of what is necessary to "insure the fair administration of justice" may differ from another's. In fact it appears that, at the time, the courts in 48 other states allowed into evidence the same types of confessions the Minnesota Supreme Court ordered must now be excluded.

This Fall, Justices Alan Page and Sandra Gardebring, who voted for this policy, will be standing for election. As a candidate for the Minnesota Supreme Court, I would like to tell the people of Minnesota what I think the policy should be. But, in 1995 and again on January 1, 1998, the Minnesota Supreme Court (including Page and Gardebring) adopted another set of policies in the form of ethical rules that judicial candidates must follow. Among these is a rule that judicial candidates cannot state their views on disputed legal or political issues. This means that I cannot discuss my views on the 1994 decision to exclude confessions from evidence, or much else for that

matter. I probably cannot even discuss the propriety of judges creating policy, as opposed to only interpreting policy created by the Legislature. Neither can any other judicial candidate. Does this policy serve the interests of the citizens of Minnesota? If neither opponents or incumbents can speak about important issues, how are people to make an informed decisions about who they want to have sit as judges?

Some have said that if judicial candidates discuss issues – I mean really discuss issues – that this will lead to partisanship. Well, what "partisan" groups are interested in the issue of whether a criminal's confession to a police officer will be told to a Minnesota jury? Are hard working, honest citizens who want to see criminals punished a "partisan" group? The idea that there is absolutely nothing a judicial candidate can say about a multitude of issues is profoundly troubling to the notions of free speech and open elections.

And thats the nub of the problem. If these rules had been created by the citizens of this State through their Legislature, the rules would have been an expression of public will. But the public has said it wants real elections about real issues; its only the policy of the Supreme Court which prevents them.

Greg Wersal

Greg Wersal, a Golden Valley lawyer, is a candidate for the Minnesota Supreme Court.

Wersal Law Office, P.A.
[Address Omitted In Printing]

Dear Editor:

Enclosed is a commentary/editorial piece for use in your newspaper. You can reach me at 612-546-3513 if you have any questions.

Yours truly,

/s/ Gregory F. Wersal
Gregory F. Wersal

Farewell To Justice Gardebring
And To All Incumbents

Justice Sandra Gardebring has announced her resignation from the Minnesota Supreme Court. Most people in this state probably did not know of her, or of her decisions on the Court. Most people were probably indifferent to the news. I, on the other hand, had a distinct reaction; I felt ill. Justice Gardebring has just stolen an election from the people of Minnesota.

Starting in January 1997 and throughout that year, I prepared a campaign to run for the Supreme Court, traveling from one corner of Minnesota to the other speaking about the need to change judicial elections. In May of year I had formally announced my candidacy against Gardebring at a rally at the State Capitol.

Now, Justice Gardebring, with the aid of other members of our Supreme Court, stole that election, not only from me, but from all Minnesotans. By her act of resignation – a resignation announced only 6 business days before candidates could file for the office with the Secretary of State – Justice Gardebring has created a situation

where the Governor will appoint someone to the Supreme Court and there will be no election for her seat this November.

I said this was done with the aid of other members of our Supreme Court, because the Supreme Court in a case before them in 1997, decided that no matter when a judge resigns prior to the expiration of his term, the Governor appoints a successor and the people of Minnesota are deprived of the right to choose their leaders in an election. Justice Alan Page stated that an incumbent judge could even stand for election in November, lose the election, and then prevent the winning candidate from taking office by resigning!

But the election system for choosing judges was corrupt long before Gardebring resigned. It was corrupted when the judges were noted as the incumbent on the ballot. It was corrupted when the judges created campaign rules that prevent their opponents from stating their views or criticizing the judges' decisions. It was corrupted when the judges created more rules that prevent their opponents from raising campaign funds, seeking endorsements or from even speaking at all to certain civic groups. (Yes, these rules really do exist.) It is so corrupt that at an election most voters have no idea who the judges are or why they should vote for them. And that apparently is the way the judges want it. And that is why virtually all of our judges in the State were originally appointed to their positions and continue to hold their positions, despite the fact that the Minnesota Constitution calls for judges to be elected by the people.

I realize now that the reason I felt ill was that, as a lawyer, I was ashamed. It is time to throw every incumbent judge out of office until they change this corrupt system.

/s/ Greg Wersal
Greg Wersal

Greg Wersal is a lawyer from Golden Valley.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 121

JUDICIAL ELECTIONS
ARE
THE KEY!!!!

WITHOUT REAL JUDICIAL ELECTIONS, THE CONSERVATIVE AGENDA WILL REMAIN STALLED:

WELFARE REFORM: Minnesota Courts have blocked recent attempts by our Legislature to control welfare spending.

CRIME AND PUNISHMENT: We are swamped with crime. Our Legislature's attempts to pass new laws will do nothing to stop it. We don't need new laws – we need judges who will put criminals in jail.

SOCIAL ENGINEERING: Judges have become the ultimate social engineers, attacking traditional concepts of morality and family. Judges impose their views on society on abortion, marriage, euthanasia, drugs, the ownership of guns, land use, environmental regulation, and the education of children.

THE PLAN OF ACTION

1. The Republican Party must fight to hear judicial candidates speak.
2. The Republican Party must fight to endorse the best candidates for judicial office.

Real Judicial Elections in 2000

We are on the way to real judicial elections in the year 2000. The Republican lawsuit progressing through the federal court system has been gaining momentum. The Minnesota Civil Liberties Union has joined with the Republican Party, arguing that judicial candidates should be able to speak at political party conventions and seek party endorsement. A final decision in district court will come as early as March or April.

OUR GOALS: The people of Minnesota should have a voice on who serves on their courts. The current election system prevents candidates from stating their views on legal issues and speaking at all to a political party. Our goal is to eliminate these rules which serve only to protect entrenched incumbents who are unaccountable to the public for their actions.

Our Goals Are:

1. **to elect judges who will strictly construe the Constitution**
2. **to elect judges who will interpret the law – not write the law**
3. **to elect judges who will respect and defer to the democratically elected Legislature on issues such as welfare, worker's comp., punishment for crime, partial birth abortion, etc.**

Prepared and paid for by Greg Wersal, 7842 Wayzata Blvd. Ste 201, St. Louis Park, MN 55426 (612) 546-3513 or (612) 701-9623.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 134

VOTE

WERSAL

Supreme Court

Gregory Wersal's
Campaign For Justice

JUDICIAL ELECTIONS
The only means to judicial accountability.

Judges are often criticized for their decisions; and so they should be. Their decisions affect the legal rights of others. They should interpret, not write, the law. Judges who make poor decisions *should be held accountable.*

Here are some recent decisions of the Minnesota Supreme Court. After reading these decisions, we hope you will be ready to –

VOTE FOR GREG WERSAL.

ABORTION

The Legislature had passed laws prohibiting the use of public funds to pay for abortions. In 1996, the Minnesota Supreme Court ruled that the State must use welfare funds to pay for abortions. This is directly contrary to the U.S. Supreme Court, which stated, "When an issue involves policy choices so sensitive as those implicated

by public funding of nontherapeutic abortions, the appropriate forum for the resolution in a democracy is the legislature." In other words, the court should defer to the legislature. The dissenting judge remarked the court "abandons all vestige of neutrality" in its pro-abortion stance. (Doe v. Gomez)

ADOPTION

In 1996, the Minnesota Supreme Court interpreted a statute affecting adoptions throughout the state. The statute stated that a natural father who failed to act within 90 days of a child's birth to state his intention to retain parental rights "shall lose parental rights". Because the Court found *that* language was not clear, the Court held that the father's parental rights were not terminated. The dissenting judge stated, "The statutory language is neither ambiguous nor confusing." (In the matter of the Paternity of J.A.V. and Conrad Hisgun)

CRIME

The Minnesota Supreme Court ruled that an in-custody confession must be tape recorded or it would not be allowed into evidence. This means that at trial the jury will not be told of the confession if the police did not tape record it. The dissenting judge, noting only one other state excludes such evidence stated, "I am unwilling to depart from the rule of the vast majority of courts in this country." (State v. Scales)

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE
(612) 546-3513

CRIME

In 1996, the Minnesota Supreme Court ruled that a criminal defendant has the *legal right* to a sentence outside of that provided for in law by the Minnesota Legislature. The Court's ruling will allow criminals to receive sentences more lenient than that provided for by the Legislature. Despite recent attempts by the Legislature to get tough on crime by passing laws for more severe sentences, the Court stated, "We see no reason not to allow a defendant . . . a departure [from State sentencing laws] as part of a plea bargain." (State v. Givens)

CRIME

The Legislature passed laws providing for more severe penalties for those who sold crack cocaine than for those who sold powdered cocaine. The Minnesota Supreme Court struck down these penalties due to the disproportionate impact on blacks. (This is directly contrary to the opinion of the U.S. Supreme Court which upheld similar Federal laws.) The dissent noted that the Legislature did not have a discriminatory purpose, but a valid purpose in providing a more severe penalty for crack, which is arguably more addictive than cocaine in the powder form. "[T]he majority has substituted its political judgment for that of the legislature. . . . [T]he power to define what act constitutes a crime and to fix the punishment for that crime rests with the legislature. This court has neither the obligation nor the right to interfere. . . . " (State v. Russell)

SEXUAL ABUSE

The Legislature passed a law to give more time to victims of sexual abuse to bring forward legal actions. In 1996 the Minnesota Supreme Court interpreted this law in such a way as to possibly eliminate hundreds of pending or anticipated sexual abuse cases before they even go to trial. Ember Reichgott Jung, author of the Statute of Limitations law, stated, "The Court appears to have overstepped its Constitutional authority in significantly rewriting the law . . . while the [Court] may not have agreed with the Legislature's approach, the Court does not have the authority to rewrite a statute that is clear on its face." (Blackowiak v. Kemp)

WELFARE

The Minnesota Supreme Court struck down a state law that limited the welfare benefits of people who recently moved to Minnesota to the amount they would have received in their state of origin. The purpose of the law was to prevent people from moving to Minnesota only to collect the higher welfare benefits paid in this state. The dissent argued the Court should defer to the Legislature, "[T]he Constitution does not empower this Court to second-guess state officials charged with the . . . responsibility of allocating limited public welfare funds. . . . " (Mitchell v. Steffen)

Who is Greg Wersal? An attorney since 1980, Greg has spoken for two years about the need for change in judicial elections. Recently Greg and the Republican Party of Minnesota have jointly sued in Federal Court asking that

new rules preventing Greg from speaking to Republican groups be struck down as violations of free speech.

Prepared and paid for by:
GREG WERSAL'S CAMPAIGN FOR JUSTICE
7841 Wayzata Blvd., Ste. 201, Minneapolis, MN 55426.
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VOTE
WERSAL
SUPREME COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 175

Hennepin County Bar Association

Professional Conduct Committee

April 17, 1997

Presentors:
DePaul Willette
Executive Secretary
MN Board on Judicial Standards

and

Catherine Haukadahl
Attorney at Law
Felhaber, Larson, Fenlon & Vogt

INDEX

- The board on Judicial Standards Rules & Procedures
- 1996 Contested Judicial Elections
- First Amendment Defense to Judicial Campaign Speech

Proposed Questions for
Judicial Candidates' Forum
September 5, 1996

1. What do you believe to be the most critical issue currently facing the Hennepin County Criminal Justice System and what do you recommend be done to address it?
2. The Minnesota Supreme Court recently adopted changes to the rules and Cannons that govern judicial behavior and discipline. One of the changes requires public disclosure of disciplinary actions when the judge's inappropriate actions or behavior is part of a pattern of such behavior. Give us your thoughts about this change to the Rules.
3. Minnesota is one of a handful of states that does not routinely allow cameras in the courtroom? Where do you stand on this issue and why?
4. How do you feel about judicial evaluation being undertaken by outside organizations? Should the results be disclosed publicly or should they be given privately and used only for the judge's person improvement.
5. The caseload in Hennepin County Juvenile Court has skyrocketed over the past few years. What do you believe to be the root cause for the high numbers of juvenile offenders? What can the court system do to reduce these numbers.
6. As a judge, who are your clients and what does it mean to provide good service to them.
7. Without giving his or her name, please describe the character of the judge you most admire.
8. Attorneys in civil litigation practice express great frustration at the length of time it takes to get their cases to trial in Hennepin County. They also express

frustration about the fact that, instead of getting a specific date for trial they are often given a period of six to eight weeks in which their case could be called, making it very difficult to prepare for trial. What can be done to address their concerns?

9. If you were given 50 million dollars and were told that it must be used to address the issues of crime and violence, what would you spend it on?

10. A variety of articles and reports on the problem of domestic abuse point to the very high percentage of cases (around 70%) that are dismissed at the pretrial stage, reportedly because the victim cannot be found or is unwilling to cooperate. What can be done to lower the number of domestic assault cases that are being dismissed?

11. What kinds of things would you do outside the courtroom to improve the justice system in Hennepin County?

12. Many feel that voluntary professional and community service is a necessary commitment for persons holding public office. What types of voluntary service have you been involved in?

13. What is, or will be, your personal mission in your role as judge and how will you go about accomplishing it?

14. Recent polls show that public trust in the justice system is at an all time low. Why do you think the public is so distrustful and what would you do to gain their trust?

15. If you observed a party in your courtroom being poorly represented by an unprepared or ineffective lawyer, what would you do?

16. The Racial Bias and Gender Bias Task Force Reports identify a multitude of ways in which women and

minorities are not treated fairly by our court system. What would you do to remedy the situation described in these reports?

17. Many victim's advocates have concerns about victim's rights in juvenile court. How would you balance the rights of crime victims and witnesses with the right to confidentiality possessed by juvenile respondents.

18. An article in the November 1995 issue of *Bench and Bar of Minnesota* entitled "Victims' Rights: Trial by Tribulation" makes the argument that crime victim rights have gone too far. It states among other things that victims are playing too great a role at the negotiation stage of a case and that victim impact statements shift the "atmospheric balance" toward punishment. Give us your thoughts about this issue?

19. Why should voters support you rather than your opponents?

20. A recent report showed that Minnesota has one of the lowest per capita rates of incarceration in the United States. Is that good or bad?

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 176

Minnesota State Bar Association

514 Nicollet Mall, Suite 300,
Minneapolis, MN 55402 – 612/333-1183

JUDICIAL ELECTIONS TASK FORCE REPORT & RECOMMENDATIONS

Adopted by the General Assembly June 19, 1997

[LOGO]

Recommendation No. 4

The MSBA should cooperate with the state Board of Judicial Standards, the Office of Lawyers Professional Responsibility, and community organizations to educate candidates and the public about the permissible range of candidate speech in judicial elections.

The Board of Judicial Standards routinely conducts educational sessions for judicial candidates on the requirements of Canon 5. In the last election, the Board also approved several lists of proposed questions for use at candidate forums. These lists were developed and submitted to the Board by W.A.T.C.H. – they are attached to this report as Appendix C.

Both lists contain useful examples of the kinds of questions regarding judicial philosophy and administration issues that are perfectly permissible under Canon 5. The Task Force recommends that the MSBA work with the Board and community groups to make information like this widely available to candidates, potential candidates and members of the public. The Task Force believes that if more voters understand both the reasons for restrictions on candidate speech and the extent to which their questions can be addressed by judicial candidates, they will become more interested and involved in the process.

Appendix C

Proposed Questions for Judicial Candidates' Forum September 5, 1996

1. What do you believe to be the most critical issue currently facing the Hennepin County Criminal Justice System and what do you recommend be done to address it?

2. The Minnesota Supreme Court recently adopted changes to the Rules and Canons that govern judicial behavior and discipline. One of the changes requires public disclosure of disciplinary actions when the judge's inappropriate actions or behavior is part of a pattern of such behavior. Give us your thoughts about this change to the Rules.

3. Minnesota is one of a handful of states that does not routinely allow cameras in the courtroom. Where do you stand on this issue and why?

4. How do you feel about judicial evaluation being undertaken by outside organizations? Should the results be disclosed publicly or should they be given privately and used only for the judge's personal improvement?

5. The caseload in Hennepin County Juvenile Court has skyrocketed over the past few years. What do you believe to be the root cause for the high numbers of juvenile offenders? What can the court system do to reduce these numbers?

6. As a judge, who are the people you serve and what does it mean to provide good service to them?

7. Without giving his or her name, please describe the character of the judge you most admire.

8. Attorneys in civil litigation practice express great frustration at the length of time it takes to get their cases to trial in Hennepin County. They also express frustration about the fact that, instead of getting a specific date for trial they are often given a period of six to eight weeks in which their case could be called, making it very difficult to prepare for trial. What can be done to address their concerns?

9. If you were given 50 million dollars and were told that it must be used to address the issues of crime and violence, what would you spend it on?

10. A variety of articles and reports on the problem of domestic abuse point to the very high percentage of cases (around 70%) that are dismissed at the pretrial stage, reportedly because the victim cannot be found or is unwilling to cooperate. What can be done to lower the number of domestic assault cases that are being dismissed?

11. What kinds of things would you do outside the courtroom to improve the justice system in Hennepin County?

12. Many feel that voluntary professional and community service is a necessary commitment for persons holding public office. What types of voluntary service have you been involved in?

13. What is, or will be, your personal mission in your role as judge and how will you go about accomplishing it?

14. Recent polls show that public trust in the justice system is at an all time low. Why do you think the public is so distrustful and what would you do to gain their trust?

15. If you observed an individual in your courtroom being poorly represented by an unprepared or ineffective lawyer, what would you do?

16. The Racial Bias and Gender Bias Task Force Reports identify a multitude of ways in which women and minorities are not treated fairly by our court system. What would you do to remedy the situation described in these reports?

17. Many victim's advocates have concerns about victim's rights in juvenile court. How would you balance the rights of crime victims and witnesses with the right to confidentiality possessed by juvenile respondents?

18. The recent outburst by Polly Klaus' murderer at his sentencing brought to national attention the potentially explosive dynamics that exist at such appearances. While defendants always have the right to speak at their sentencing, local victims' organizations have expressed concern about the fact that many judges are now allowing defendants' friends and family to speak on their behalf at sentencing. In some instances this has resulted in name calling, blaming the victim, and fights breaking out between the two families outside the courtroom. How do you, or would you, handle this situation in your courtroom?

19. It has been said that we learn best from our mistakes. Tell us about a mistake that you made that taught you something about law and justice. How did this or will this experience influence your work on the bench?

Questions for Judicial Candidate Forum
October 29, 1996

1. What do you believe to be the root causes for the high numbers of juvenile offenders? What changes can the court system make to reduce these numbers?

2. How could the costs of judicial administration be reduced? Can you give us a specific example of how you have reduced costs in your law practice/court?

3. In the area of hate crimes, what are some of the issues in balancing free speech rights against the need to control offensive activity?

4. What have been the most effective methods for improving court procedures and efficiency? What other methods would you suggest?

5. What do you perceive as the greatest obstacles to justice, if any?

6. What criteria would you use for deciding whether to impose or affirm sentences outside of standard ranges?

7. If you became aware of unethical conduct on the part of a trial advocate in a case in which you were presiding, how would you handle it? Do you believe judges should be required to report attorney misconduct?

8. To what extent have you practiced in the area of criminal law? Family Law? Complex civil litigation?

9. What do you believe are the causes of the high rates of minority incarceration?

10. Do you believe there is such a thing as a "victimless crime"? If so, what offenses would you place in this category?

11. Do you believe there is underrepresentation of women or people of color in the court system? If so, how would you work to correct the problem?

12. Do you believe that all citizens have adequate access to legal help and the legal system? If not, what can be done to provide wider and better access?

13. Please describe one instance in which you faced an ethical dilemma and how you resolved it.

14. Do you believe that voluntary professional and community service is a necessary commitment for persons holding public office? What forms of voluntary professional and community service have you been involved with in the past? Currently?

15. What injustices have you witnessed in or outside the courtroom and what was your response to those events?

16. What are the pros and cons of going to the bench as compared to practicing law?

17. Do you believe the current system for disciplining lawyers and judges is effective? Why or why not?

18. Who are your judicial role models? Why?

19. How do you deal with difficult people, including peers, lawyers, clients, or litigants?

20. Please describe a situation in which you took a controversial position that angered or offended people and explain how you handled it.

21. How would/do you deal with a *pro se* party appearing in your court?

22. Please describe your administrative experience. What are your primary strengths as a supervisor? As an administrator?

23. While serving on the bench, do you believe you have a role in bringing important legal or judicial issues before the public or the legislature? Why or why not? What should your role be?

24. What are the issues regarding alternative sentences for non-violent offenders?

25. What is your general judicial philosophy?

26. What is your vision for the future of our judicial system? What changes would you advocate and why?

27. Do judges have an obligation to improve public understanding of the courts? If so, how should they carry out that obligation?

28. Please describe your first-hand experiences, if any, dealing with people who are different from you socially, economically, or politically.

29. Do you think the court system is working or do you believe the civil or criminal justice system is breaking down?

30. What are your views on the need for more diversity on the bench and the manner in which the court treats members of different races?

31. Why should voters support you rather than your opponent?

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 186

Motion to Amend the Recommendation of the Executive Committee Regarding Canon 5

A motion will be made to amend the Recommendation of the Executive Committee to eliminate the following language:

> "Recommended, that in the event that either the 8th Circuit Court of Appeals or the U.S. District Court for the District of Minnesota invalidates the 'announce' provision of Canon 5 of the Minnesota Code of Judicial Conduct on constitutional grounds, or at such earlier time as the MSBA Executive Committee in its discretion deems appropriate."

And replace it with the phrase "Will all due deliberate speed".

The amended Recommendation would read as follows:

> With all due deliberate speed, the Minnesota State Bar Association shall petition the Minnesota Supreme Court to amend Section A(3)(d)(i) of Canon 5 of the Minnesota Code of Judicial Conduct in the following respect:
>
> A. (3) A candidate for a judicial office, including incumbent judge:

> (d) shall not:
>
> (i) . . . announce his or her views on disputed legal or political issues . . . *make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . .*

Reasons for the amendment are as follows:

1) The Constitution: The Executive Committee Report recognizes there are grave constitutional problems with the "announce" provision. As a group of lawyers committed to the Constitution, we should immediately petition the Court for change.

2) The Elections: We want fair elections. The Board on Judicial Standards continues to apply the "announce" provision to judges, but the Office of Lawyers Professional Responsibility has refused to enforce the provision against lawyer candidates. This creates an unfair situation. If the MSBA acts immediately to petition the Minnesota Supreme Court, the court could make the changes necessary before the election season has progressed too far.

3) Leadership: Recently the press has given much attention to the lawsuit regarding Canon 5. How will it look in the press if the MSBA sits on its hands? The MSBA should take a leadership role on this issue.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Declaration of Gregory F. Wersal Filed March 12, 1999

EXHIBIT 189

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE

VOTE
WERSAL
SUPREME COURT

PRESS RELEASE 6-26-98
ATTN: NEWS DEPARTMENT

Today in a major policy decision, the members of the Minnesota State Bar Association (MSBA), meeting at their state convention in Duluth, have authorized the MSBA to petition the Minnesota Supreme Court to change Canon 5 of the Code of Judicial Conduct. Canon 5 severely restricts judicial candidates campaign activity and has recently come under attack by a lawsuit filed by Greg Wersal, a candidate for the Minnesota Supreme Court.

Greg Wersal, a lawyer form [sic] Golden Valley, argued that the "announce" provision of Canon 5 is an unconstitutional infringement of free speech and urged the MSBA to take action. The "announce" provision of Canon 5 states "a candidate for judicial office . . . shall not . . . announce his or her view on disputed legal or political issues. . . . "

The MSBA also proposed that the "announce" provision be replaced with a statement that a judicial candidate "shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues likely to come before the court. . . . " This is the

same language suggested by Mr. Wersal in his lawsuit which is currently pending before the 8th Circuit U.S. Court of Appeals.

This is a major victory for Greg Wersal and further highlights his campaign to open up judicial elections so that the voters will know who the candidates are and have a reason to vote for them. Greg Wersal, age 43, began his campaign to change judicial elections in 1996 by speaking at political party conventions, a method not seen before in judicial elections. On January 1, 1998 the Minnesota Supreme Court changed Canon 5 to prohibit judicial candidates from speaking at political party conventions. In February 1998, Mr. Wersal joined by the Republican Party of Minnesota, began his lawsuit. At the Republican Party State Convention held last week in Minneapolis, the delegates adopted a platform plank stating that judicial candidates be allowed to "state their opinions on legal issues and past cases."

Campaign For Justice
7841 Wayzata Blvd.
Suite 201
Minneapolis, MN 55426

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE
(612) 546-3513

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, an association; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, an association; REPUBLICAN SENIORS, an association, YOUNG REPUBLICAN LEAGUE OF MINNESOTA, a Minnesota nonprofit corporation, MINNESOTA COLLEGE REPUBLICANS, an association; GREGORY F. WERSAL, individually; CHERYL L. WERSAL, individually; MARK E. WERSAL, individually; CARWIN C. HULBERT, individually; CAMPAIGN FOR JUSTICE, an association; MINNESOTA AFRICAN AMERICAN REPUBLICAN COUNCIL, an association; MUSLIM REPUBLICANS, an association; MICHAEL MAXIM, individually; and KEVIN J. KOLOSKY, individually,

Plaintiffs,

vs.

Case No. 98-831(MJD)

PLAINTIFF GREGORY F. WERSAL'S DECLARATION

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; CHARLES E. LUNDBERG, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and EDWARD J. CLEARY, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants.

GREGORY F. WERSAL states as follows:

1. In December 1997, I had scheduled speaking engagements at various Republican Party groups through January and February 1998. While I had contacted numerous groups, I was only able to recall the following meetings based on my recollection and a review of my calendar:

   a. House District 53(B) Republicans meeting at 527 Shoreview Park Road, Ramsey County;

   b. Senate District 50 Republicans meeting at Oakview Middle School in Andover;

   c. Senate District 42 Republican meeting in Edina;

   d. Second Congressional District Republicans meeting at Hubble House Restaurant in Mantorville;

   e. McLeod County Republican meeting in Hutchinson Senior Center;

   f. Senate District 37 Republican meeting at Empire Town Hall;

g. Senate District 23 Republican meeting in Maple Grove Community Center;

h. Senate District 35 Republican meeting at Jay's Restaurant in Chaska;

i. House District 53A Republicans meeting at Shoreview Community Center;

j. House District 29A Republicans meeting at Hastings Public Library;

k. Senate District 51 Republicans meeting at Lino Lakes City Hall;

l. Senate District 47 Republicans meeting at Lakeland Park Building in Brooklyn Park;

m. Senate District 49 Republicans meeting at Coon Rapids City Hall;

n. 8th Congressional District Republicans meeting at Windtree Restaurant in Barnum;

o. House District 52A Republicans meeting at Fridley Public Library;

p. Meeker County Republicans meeting at Main Street Café in Litchfield; and

q. Senate District 20 Republicans meeting at Cokato.

2. The meetings listed above are among the most important for a elective candidate to attend. The people attending these meetings are the most active party members who attend regular meetings, not simply show up for a convention. These members are more likely to become active in a candidate's campaign, volunteering time, contributing money, and actively promote a candidate to others. Also, these individuals are more likely to vote.

3. As a result of the January 1, 1998 changes to the Code of Judicial Conduct prohibiting judicial candidates from attending or speaking at political party gatherings, I had to cancel all of these speaking engagements. As a result of the January 1, 1998 changes, members of my campaign committee were prohibited from attending these same political party functions for the purpose of distributing my literature, speaking on my behalf, soliciting campaign contributions, stating my views on legal or political issues or seeking a political party endorsement. Many of these meetings were scheduled in public places, but as a result of the January 1, 1998 changes, both I and my campaign members were compelled to avoid these gathering places. As a result of the January 1, 1998 changes a new ethical problem arose regarding the conduct of third parties at Republican political gatherings who might speak on my behalf or distribute my literature.

4. On February 4, 1998, I was a guest on the Jason Lewis Program of KSTP 1500 radio station in St. Paul. As a result of Canon 5's restriction, my ability to discuss the law with Mr. Lewis was very limited. Mr. Lewis asked me if I could give my opinion about the death penalty and several other matters. All of which I had to respond that I could not. Even though the death penalty does not exist in Minnesota, and therefore would seem to be an *undisputed* area of the law, I was convinced that the language of Canon 5 was so broad that I could not discuss the topic without the risk of an ethical violation. Because of the restrictions of Canon 5, I missed the opportunity to announce to the listeners of Mr. Lewis' program my views on a wide variety of legal issues or my prior political party activity or affiliation. In addition, I could not solicit the listeners to make a contribution to my campaign for a

public elective office in Minnesota, I could not solicit the listeners to seek my endorsement for a public elective office in Minnesota from a political party and I could not solicit the listeners to speak on my behalf for a public elective office in Minnesota at political gatherings.

5. On February 11, 1998 I was a guest speaker at a political science class at Northwestern College in Roseville. After a discussion of the rules contained in the Code of Judicial Conduct, one student asked me why I was running for a judicial office when virtually all of the elements considered necessary for success in a normal political contest (the ability to seek political party endorsement, the ability to attend and speak at political gatherings, the ability to state your views on issues or effectively criticize your opponent's decisions, the ability to raise money for a campaign) had been denied to me as a judicial candidate. As a result of the prohibitions contained in Canon 5, I was unable to answer the student's question. Likewise, I was unable to discuss my views on legal issues, unable to inform the students of my prior political party activity or affiliation, unable to solicit campaign contributions from the students, unable to request that the students seek my endorsement from a political party for election to the Supreme Court and unable to request that the students speak on my behalf for election to the Supreme Court at political gatherings – all of this was due to Canon 5's restrictions on my campaign activity.

6. On March 3, 1998, precinct caucuses were held throughout the State of Minnesota. I had attended precinct caucuses as a judicial candidate in 1996 and would have attended on March 3, 1998 if the changes to Canon 5 which took effect on January 1,

1998 had not prohibited my attendance. Minnesota state law provides that anyone may attend a precinct caucus, if only as an observer. The people who would attend a precinct caucus would be the people who live in my immediate neighborhood; in other words, my neighbors. Because of the prohibitions contained in Canon 5, I was prohibited from:

a. attending and speaking at my precinct caucus or at any other precinct caucus;

b. speaking to the caucus participants about my views on legal and political issues;

c. soliciting campaign contributions;

d. identifying myself as having been a member of a political party; and

e. seeking the endorsement of a political party.

7. Because of the prohibitions contained in Canon 5, Cheryl Wersal, Mark Wersal, Corwin Hulbert, and members of my campaign committee Campaign For Justice were prohibited from engaging in these same activities at precinct caucuses or other political gatherings.

8. Canon 5 not only restricted my ability to engage in First Amendment activities of [sic] behalf of my own campaign, but it also specifically enjoined that I not "knowingly permit" others to do on my behalf what I could not directly do under Canon 5. In March 1998, because of this "knowingly permit" clause, I became very concerned that the third parties – over whom I had little influence – would engage in activities – all of which are protected in the First Amendment – which could form the basis of an ethical complaint against me under the "knowingly permit" clause. In March, the Republican Party held conventions at the Senate district or

County level. It came to my attention that campaign materials, apparently from my campaign activities in 1996 and 1997, were handed out during at least one Republican convention by individuals other than myself or my campaign committee.

9. On March 24, 1998 I sent out letters to five individuals asking them to not speak on my behalf or hand out copies of my campaign literature at Republican Conventions. Mr. Jack Graham, who received one of these letter, [sic] told me that he was not running for a judicial office and would exercise his free speech as he wished. Mr. Corwin Hulbert, who received one of the letters, told me that he would accede to my request but that it was an unfair imposition on his free speech rights.

10. Throughout April and May 1998, there were over 120 Republican Conventions held at the Senate District or County level and 8 conventions at the Congressional District level. Because of the prohibitions contained in Canon 5, neither I nor my campaign committee could:

    a. attend or speak on my behalf at these conventions;

    b. inform participants about my views on "disputed" legal or political issues;

    c. solicit campaign contributions from attendees;

    d. identify myself to attendees as a current or former member of a political party;

    e. seek the endorsement of the political party; and

    f. encourage the attendees to speak on my behalf to other Republicans or state my views on "disputed" political or legal issues to other Republicans or to seek my enforcement by a political party.

11. In late March, 1998, I was once again faced with the possibility that the activities of third parties could place me in jeopardy of an ethical violation. I had planned with my campaign committee to speak at a college campus, the Hennepin Technical College on April 4, 1998. However, I discovered that the Senate District 43 Republican Convention would be held the same day in one room on the college campus. Therefore, on March 27, 1998 I wrote a letter to Mr. Edward Cleary, the Director of the Office of Lawyers Professional Responsibility, requesting an advisory opinion. Specifically, I wanted to know if it would be an ethical violation of Canon 5 for myself or members of my campaign committee to hand out campaign literature at a public place if there were a possibility that a third party receiving the literature could carry it into the ongoing Senate District 43 Republican Convention and speak on behalf of my candidacy. See Exhibit 13 attached to this Declaration. On March 31, 1998, Mr. Cleary responded that he would not provide me an advisory opinion solely because I had filed a lawsuit against Mr. Cleary in his official capacity as Executive Director of the Office of Lawyers Professional Responsibility. Because of the prohibitions contained in Canon 5 prohibiting me as a candidate from allowing others to do what I cannot do, neither I nor my committee members distributed literature at Hennepin Technical College on April 4, 1998. If a candidate is not safe advocating his candidacy in a public forum, I became very concerned about how I could campaign without placing myself in jeopardy of having an ethical complaint filed against me period. Because Canon 5 specifically states that judicial candidates are "ethically responsible" for the activities of third parties – third parties who are not even lawyers who would

know or even understand these vague and convoluted ethical rules – I would be subjecting myself to a greater risk of the filing of ethical complaint the more I campaigned, the more I distributed campaign literature, the more I sought support from people for my campaign or the more I engaged in any other activity normally connected with a campaign for public office. Essentially, the more people I convinced to support my candidacy, the more likely it was that those very same people who wished to see me as an Associate Justice on the Supreme Court, if they spoke on my behalf to a political gathering, would end up creating ethical problems for me thereby damaging my campaign.

12. The Republican Party of Minnesota held its convention at the Target Center in Minneapolis from June 18 to June 20, 1998. In the days immediately preceding the convention, I received calls from individuals who wanted to support my candidacy and who were delegates to that convention. In each case, after the individuals told me they wanted to help my candidacy by informing others about me and my candidacy, I had to do something which would be absolutely unthinkable for any other candidate for public office – I had to ask them not to speak to others on my behalf at the convention, not to seek my endorsement, not to tell others my views on legal or political issues and not to identify me as a Republican. As a candidate, I would have been better off if I did not know of their planned activity. Once I knew of their plans, Canon 5 compelled me to inform them not to take action on my behalf otherwise I risked having an ethical complaint filed against me as happened with my 1996 campaign. My notes of my conversations with two of these individuals are attached as Exhibit 21.

13. In the days immediately prior to the State Conventions for the Republican Party, Reform Party and Democratic Party, I discussed with my campaign committee my desire to publicly protest Canon 5's prohibition on my ability to attend a political party convention. The question was whether I could stand with protest signs on the public roadway or sidewalks outside of the convention sites. I would not attend the conventions but I would be outside protesting my inability to attend. My protest would most likely draw the attention of the media to my campaign and to my message which was the Canon 5 needed to be changed. My protest would have been directed at the Minnesota Supreme Court for adopting Canon 5, not the people attending the convention. But because of the threat of an ethical complaint being filed against me based on the activities of third parties who would attend these conventions, the idea was abandoned.

14. I have attended debates held by a debating society called the John Adams Society, which holds regular meetings at which various issues are debated. Members of the Society informed me that because of Canon 5's prohibitions, the Society intended to hold a debate regarding the constitutionality of Canon 5. The John Adams Society scheduled a meeting for June 18, 1998 at a room in the Target Center. The John Adams Society welcomes guests and it was likely that some delegates to the State Convention of the Republican party of Minnesota, who were also meeting in the Target Center, would attend the debate. Again I faced issue of the activities of third parties placing me in jeopardy of an ethical complaint. It was likely that third parties who attended the John Adams Society meeting would return to the Republican Convention and speak to others about my candidacy. It was also

likely that third parties would see me in the Target Center and assume that I was attending the Republican Convention. Finally, it was likely that third parties would mistake the intellectual traditions of a debating society for a statement of my opinion on a disputed legal and political issues. [sic] Each of these activities are arguably grounds for an ethical complaint that I had violated Canon 5. Therefore, I decided not to be [sic] attend the scheduled meeting of the John Adams Society.

15. On July 13, 1998 I again appeared on the Jason Lewis show on KSTP 1500 radio. Similarly to my previous broadcast, I was unable to respond [sic] committee questions which Mr. Lewis had regarding my candidacy or to questions submitted by listeners who called in – many of whom stated they were voters in Minnesota and were frustrated with a lack of information provided in judicial races.

16. On May 20, 1998, I attended the Sentinel Club and gave a speech regarding my candidacy. However, again because of Canon 5's prohibitions, I was unable to talk about any issues related to the campaign other than the fact that I was unable to talk about issues related to the campaign. A copy of the text of my speech is attached as Exhibit 51.

17. On June 13, 1998, shortly before the Republican State Convention, I appeared as a guest of Ron Rosenbaum's show Holding Court on WCCO Radio in Minneapolis. Mr. Joseph Friedberg joined Mr. Rosenbaum in asking me to announce my views on legal and political issues. I was asked what I would like to talk about if I could. And I said the *Scales* case which dealt with the admissibility of confessions. Mr. Friedberg, a criminal lawyer of some notoriety, tried to engage me in a debate about a criminal case by saying the case was excellent law

and I was wrong to criticize it. I was unable to respond to Mr. Friedberg because Canon 5 prohibits candidates from announcing their views on disputed legal and political issues. The audience must have thought I was ignorant or simply dumbfounded at Mr. Friedberg's comments when I was unable to respond.

18. From July 24 through September 15, 1998, I was on radio programs on 35 stations throughout the state including the following: Mankato, New Ulm, Winona, Red Wing, Northfield, Hastings, Jackson, Pipestone, Marshall, Redwood Falls, Willmar, Ortonville, Morris, Alexandria, Albany, St. Cloud, Buffalo, Fergus Falls, Detroit Lakes, Wadena, Brainerd, Aitkin, Duluth, Pelican Lakes, Grand Rapids, Hibbing, Virginia, Ada, Fosston, Crookston, Thief River Falls, Minneapolis, St. Paul, Burnsville and Roseville. A typical example of my radio interviews occurred at the Aitkin radio station KKIN on July 28, 1998. I explained that my candidacy had been reduced to attempting to eliminate Canon 5's prohibitions and why I thought Canon 5 had made judicial elections meaningless. John Tholen of KKIN then asked me, "Can you give us your opinion on gun control?" "Can you tell us your view of the death penalty or land use planning" and similar questions. In response, I could only say that Canon 5 required that I decline to discuss these issues.

19. Whether it was simply a game that radio personalities liked to engage in, or more likely that it was a means to impress upon the radio listeners the restrictions on a judicial candidate's speech, I was asked at almost every radio station a series of questions about legal or political issues which Canon 5 would not allow me to discuss and to which the interviewer expected I could not answer.

20. Perhaps the most frustrating radio interview occurred on September 11, 1998 with Scott Hall of KAXE radio in Grand Rapids. At the interview, Mr. Hall had a news release provided to radio stations and other press organizations by the Minnesota Women's Lawyers dated September 4, 1998. See Exhibit 143. The news release attached lists of questions for a press organization to ask judicial candidates and says, "The enclosed list of questions . . . are approved for use in public forums by the Executive Secretary of the Minnesota Board on Judicial Standards. These questions and questions like them can be answered without concern about violating ethical Canon 5." After I had discussed that my candidacy was an effort to change Canon 5 and why I thought Canon 5 had made judicial elections meaningless, Mr. Hall disagreed and said "the Minnesota Women's Lawyers and the Board on Judicial Standards says you can answer the list of questions." Mr. Hall asked me two questions contained on the list – "As a judge, who are the people you serve and what does it mean to give good service to them." This is question #6 on the list of proposed questions. I answered that a judge serves the people of Minnesota, but I declined to answer the remaining part of the question. For me to answer what I thought would be "good service", I would have to describe my judicial philosophy against judicial activism and the need for strict construction of the Constitution. I knew from my legal research on Canon 5 that ethical complaints had been filed against judicial candidates in other states under the "announce" clause based on a candidate's discussion of judicial philosophy. I refused to answer and tried to explain my reason to Mr. Scott but he was not satisfied. Mr. Scott then asked me question #9 on the list, "If you were

given 50 million dollars and were told that it must be used to address the issues of crime and violence, what would you do with it?" Again, I declined to answer. The question raises numerous legal and political issues. The first is whether judges should be allocating money at all – it would seem to be a legislative issue. And if I said the money should be used for gun control or gun registration or if I said it should be used to build more prisons, as opposed to expanded probation, or if I said the money should be used to establish the death penalty, anyone who thought I was "announcing" my views on these disputed legal and political issues could file an ethical complaint against me.

21. Mr. Scott was very frustrated. He said that if the Executive Secretary of the Minnesota Board on Judicial Standards had approved these questions I should be able to answer them. I tried to explain that different people might have different views on when my statements were announcing my views on legal and political issues and that I had to protect myself against all possible ethical complaints. (Moreover, after this experience, I concluded that the Board on Judicial Standard's list would be more helpful to me in avoiding an ethical complaint, if it prescribed not a list of questions I could answer, but rather a list of answers I could give to any question.)

22. Mr. Scott was very unhappy – and I can only imagine what was going through the minds of the listeners to that program. Again, Canon 5 prevented me from stating my views on legal and political issues and this provides a perfect example of how these rules damaged my candidacy. In addition Canon 5 prohibited me from discussing during these radio interviews my prior political party

activity or affiliation, from making a general solicitation of campaign funds, or from asking the listeners to speak to others on my behalf because of the possibility it would place me in jeopardy of having ethical complaint [sic] filed against me based on third party activities.

23. Between July 24 and September 15, 1998 I personally spoke to editors or reporters from newspapers in 113 towns including the following: Minneapolis, St. Paul, Caledonia, Preston, Austin, Albert Lea, Winona, Rochester, Kassou, Dodge Center, Owatonna, Plainview, Kenyou, Fairbault, Lake City, Red Wing, Cannon Falls, Northfield, Hastings, Blue Earth, Fairmont, Jackson, Worthington, Laverne, Pipestone, Slayton, Windom, St. James, New Ulm, Sleepy Eye, Springfield, Tracy, Ivanhoe, Marshall, Redwood Falls, Fairfax, Gibbon, Winthrop, Gaylord, Arlington, St. Peter, LeCenter, Le Sueur, Belle Plaine, Jordan, Chaska, Waconia, Norwood, Glencoe, Hutchinson, Hector, Olivia, Renville, Granite Falls, Montevideo, Madison, Appleton, Ortonville, Benson, Willmar, Litchfield, Buffalo, Monticello, Glenwood, Morris, Herman, Wheaton, Elbow Lake, St. Cloud, Albany, Sauk Centre, Alexandria, Long Prairie, Browerville, Clarissa, Parkers Prairie, Staples, Wadena, New York Mills, Perham, Detroit Lakes, Pelican Rapids, Fergus Falls, Battle Lake, Park Rapids, Mahnomen, Bemidji, Bagley, Stillwater, Lindstrom, Elk River, Big Lake, Foley, Milaca, Princeton, Cambridge, Mora, Pine City, Sandstone, Little Falls, Brainerd, Crosby, Ironton, Aitkin, Grand Rapids, Hibbing, Chisholm, Virginia, Cook, Tower, Ely, Two Harbors, and Duluth.

24. When I met with newspaper editors and reporters, I would explain that my candidacy was an effort to eliminate Canon 5's unconstitutional prohibitions

on a judicial candidate's campaign activities and why I thought Canon 5 had made judicial elections meaningless. However, because of Canon 5, I could not discuss my candidacy to the Supreme Court beyond the issue of Canon 5's unconstitutional prohibitions. I met with over 130 reporters or editors; however, I was unable to discuss my views on legal and political issues, tell them of my prior political party affiliation, or ask them for an endorsement which are common on newspaper editorial pages at elections.

25. On July 7, 1998, I held a press conference to announce my candidacy against Associate Justice Alan Page. In my speech I talked about how the Supreme Court including Associate Justice Page, had successfully squelched the ability of their opponents to campaign against them through Canon 5's unconstitutional prohibitions. The reporter from the Minneapolis *Star Tribune* said to me that my discussion about being silenced will only get my candidacy so far. Eventually, he maintained I would have to discuss why the voters should elect me and, if I couldn't define that, my candidacy was done.

26. Had I not been constrained by the Supreme Court's adoption of the unconstitutional provisions in Canon 5, I would have discussed several of Justice Page's decisions in criminal cases. In my opinion, these decisions were not properly decided under the Minnesota or U.S. Constitutions, were not within the mainstream of legal opinion and that Mr. Page "was soft" on crime. Had I been able to discuss my views on these legal issues, the reporter from the *Star Tribune* would not have made that comment and perhaps my candidacy would have survived.

27. In August 1998 I was asked by Mr. Henry Braddock if I would attend and speak at a gathering of "constitutionalists". I knew Mr. Braddock as a member of the John Adams Society. I agreed. As Mr. Braddock was giving me directions to attend, I discovered that this meeting would occur immediately before a convention of the Minnesota Taxpayers Party on the same site and would most likely be attended by the same people. As a result, I declined Mr. Braddock's invitation because of its nexus to a political party gathering. Mr. Braddock and his group wanted to hear me speak about my candidacy for a public office in Minnesota. However, Canon 5 requires that lawyers who are judicial candidates divorce themselves from any affiliation with a political party in order to avoid the filing of an ethical complaint. Mr. Braddock offered that the group would meet at a different site. Nonetheless, I still had to decline.

28. In mid-August, 1998, I received a letter from April Guerin dated August 10, 1998. See, Exhibit 28. Ms. Guerin asked me to send her information regarding my candidacy which she would then use in the newsletter to Republicans in Senate District 43. Ms. Guerin, a Republican, was asking me for information about my campaign so that she could inform Republicans about my candidacy, asked them for their support, and for their endorsement of my candidacy. Again because of the threat that Ms. Guerin's activities could place me in jeopardy of having an ethical complaint filed against me, I did not respond to the request. If I had not been constrained by Canon 5, I would [sic] gladly provided these materials to Ms. Guerin.

29. Had the restrictions of Canon 5 not existed, I would have been able to conduct a real campaign for judicial office:

    a. I would have attended and spoken at the monthly meetings of the Senate District or County Republican organizations as I had scheduled to do in January and February of 1998;

    b. I would have gone to precinct caucuses on March 3, 1998;

    c. I would have distributed campaign materials at the precincts;

    d. I would have had Campaign Committee members and volunteers go to precinct caucuses to:

        i. inform people about my candidacy;

        ii. announce my views on legal issues;

        iii. inform people of my past political party associations;

        iv. ask people to speak on my behalf to others;

        v. ask people to seek my endorsement; and

        vi. ask people for campaign contributions;

    e. I would have attended and spoken at senate district/county conventions, the 8 congressional district conventions and the State Convention of the Republican Party;

    f. I would have had campaign materials distributed at these conventions and committee members and volunteers would have helped me. Again, the purpose would have been to:

i. inform people about my candidacy;

ii. announce my views on legal issues;

iii. inform people of my past political party associations;

iv. ask people to speak on my behalf to others;

v. ask people to seek my endorsement; and

vi. ask people for campaign contributions.

30. I believe that, but for the restrictions imposed by Canon 5 on January 1, 1998, I would have been endorsed by the Republican Party of Minnesota at its state convention.

31. If I had been endorsed by the Republican Party, I would have used that endorsement as a means of establishing credibility with the people of Minnesota and the press, as well as other groups that consider endorsing judicial candidates, such as police groups, prosecutor groups, single issue interest groups, and other political parties.

32. I believe that if I as a candidate had been able to solicit campaign funds, that contributions to my campaign would have been significant and sufficient to run for a state wide office.

33. After the conventions, I would have again campaigned throughout the state speaking to reporters from newspapers, radio stations and television stations as I did. Without the ethical prohibitions of Canon 5, I would have been able to talk about more than why I could not talk about legal issues. I think the voters of Minnesota would have had far more information than is allowed under the current system and that the voters could make an intelligent choice between candidates when they voted in the primary.

34. It is my experience as a candidate for a state wide judicial office that it is virtually impossible to [sic] anyone to run against an incumbent and win given the current restrictions of Canon 5:

a. To successfully run for a state wide office against an incumbent, candidates must be able to seek the support of the state wide organization of a political party. No other group has a state wide mechanism for supporting a candidacy. By preventing political parties from supporting judicial candidates, the Minnesota Supreme Court has made it virtually impossible to defeat an incumbent judge;

b. To successfully run for a state wide office against an incumbent, candidates must be able to discuss issues and effectively criticize their opponent. The public wants more information so they can make an intelligent decision when voting.

c. To successfully run for a state wide office against an incumbent, candidates must be able to personally solicit money for their campaigns. To prevent candidates from effectively raising campaign funds is simply a means of negating the constitutional requirements of elections. People want and expect candidates for office to ask for money. There is no reason that the "harm" created by the solicitation of campaign funds is more acute for the judicial branch than it is for the legislative or executive branch. This harm could be almost entirely avoided by other means such as limitations on how much an individual can give and the use of a campaign committee to actually collect the money and keep the names of donors from the candidate;

d. To successfully run for a state wide office against an incumbent, candidates must be able to encourage voters to tell others about their candidacy. The candidate cannot possibly talk to each voter individually or each voter outside of the organizations the voter belongs to, such as a political party. Canon 5, which creates an ethical violation based on the actions of third parties, make any candidate a target for opponents; and

e. It is my experience as a candidate for state wide judicial office, over the period from January 1996 to September 15, 1998, that voters want more information on judicial candidates. At one campaign stop, on July 28, 1998 I had the opportunity to meet people having breakfast at a local restaurant in Aitkin, Minnesota. All of them told me of their frustration with judicial elections, that they did not have enough information. Having talked to hundreds of voters, I heard again and again, the almost universal complaint that they did not know who the judicial candidates were or why they should vote for them.

35. Based on my experience as a candidate for state wide judicial office in the years 1996, 1997 and 1998, the "announce" clause contained in Canon 5 creates an enormous barrier for a candidate. During my candidacy every piece of campaign literature, every prepared speech and every opinion piece for a newspaper went through numerous drafts as I was required to review it with lawyers to avoid any possible violation of Canon 5 while still trying to say something meaningful about my campaign and the issues. Campaign materials were drafted with

the specific purpose of trying not to state my opinion about legal or political issues. Even so, others said that I had stated my opinion on legal issues, resulting in an ethical complaint against me in 1996. I felt as a candidate I was constantly looking over my shoulder waiting for yet another ethical complaint to be filed.

36. After a Minnesota lawyers filed ethical complaint against me in 1996, I became more and more worried that an ethical complaint would be filed against me in 1998 and derail a campaign in which I had invested numerous hours over a period of years. In 1998, some of my campaign materials included a statement "neither in this letter, nor the attachment, have I stated my opinion; but I have tried to present facts and the arguments of others so you may decide for yourself what to believe. Please do not confuse my having presented arguments, or the inadequacy of my presentation in this limited space, with my belief in the argument." See, Exhibit 41.

37. This problem was even more severe when I was talking directly with the voters or with the press. In these instances, I would be asked questions I was expected to answer; however, I was not going to have the ability to have attorneys carefully draft my answer before giving a response to the voter of the street or an interviewer on a radio program. As a result, I often declined to answer questions that perhaps I should have answered because it was safer to decline to respond to such a question rather than risk the filing of an ethical complaint.

38. A true and correct copy of my address to Republican Party Convention Delegates in 1996 is attached hereto as Exhibit 1.

39. A true and correct copy of my 1997 Convention speech given to Congressional District Conventions is attached hereto as Exhibit 2.

40. A true and correct copy of the Notice of Motion and Motion dated February 22, 1998 is attached hereto as Exhibit 3.

41. A true and correct copy of the Order denying Plaintiffs' Motion for a Temporary Restraining Order dated March 3, 1998 is attached hereto as Exhibit 4.

42. A true and correct copy of Plaintiffs' Notice of Appeal dated March 3, 1998 is attached hereto as Exhibit 5.

43. A true and correct copy of Plaintiffs' Motion Re: Rule 8 Injunctive Relief dated March 3, 1998 is attached hereto as Exhibit 6.

44. A true and correct copy of the denial of Plaintiff's [sic] Motion for Injunctive Relief is attached hereto as Exhibit 7.

45. A true and correct copy of the Memorandum Opinion and Order dated March 9, 1998 denying Plaintiffs' Motion for Temporary Restraining Order is attached hereto as Exhibit 8.

46. A true and correct copy of Plaintiffs' Rule 8 Motion Re: State Senate District and County Conventions dared [sic] March 9, 1998 is attached hereto as Exhibit 9.

47. A true and correct copy of the denial of Plaintiff's Rule 8 Motion dated Mach 13, 1998 is attached hereto as Exhibit 10.

48. A true and correct copy of letters sent by Greg Wersal to certain Republican delegates requesting them not to speak on my behalf is attached hereto as Exhibit 11.

49. A true and correct copy of the Request for Advisory Opinion dated March 27, 1998 is attached hereto as Exhibit 12.

50. A true and correct copy of the Office of Lawyers Professional Responsibility's (OLPR's) denial of the Request for Advisory Opinion is attached hereto as Exhibit 13.

51. A true and correct copy of Plaintiff's Rule 8 Motion Re: Congressional District Conventions dated April 15, 1998 is attached hereto as Exhibit 14.

52. A true and correct copy of the denial of Plaintiff's Motion dated April 24, 1998 is attached hereto as Exhibit 15.

53. A true and correct copy of the Schedule of 1998 Republican Congressional District Conventions is attached hereto as Exhibit 16.

54. A true and correct copy of the Application for Injunctive Relief Pending Petition for Writ of Certiorari dated June 4, 1998 is attached hereto as Exhibit 17.

55. A true and correct copy of the RPM's Convention Edition Newsletter dated May/June 1998 dated is attached hereto as Exhibit 18.

56. A true and correct copy of the City Pages article dated June 17, 1998 is attached hereto as Exhibit 19.

57. A true and correct copy of the Notification of Receipt of Application for Injunctive Relief dated June 18, 1998 is attached hereto as Exhibit 20.

58. A true and correct copy of Notes of Greg Wersal's phone conversations with two supporters in the days preceding the Republican State Convention on June 18, 1998 are attached hereto as Exhibit 21.

59. A true and correct copy of Bill Mohrman's letter to RPM Chairman William A. Cooper dated June 18, 1998 is attached hereto as Exhibit 22.

60. A true and correct copy of the Minneapolis Star Tribune ("Star Tribune" article dated June 20, 1998 is attached hereto as Exhibit 23.

61. A true and correct copy of the Minneapolis Star Tribune article date June 21, 1998 is attached hereto as Exhibit 24.

62. A true and correct copy of the Star Tribune front cover dated June 20, 1998 is attached hereto as Exhibit 25.

63. A true and correct copy of Greg Wersal's letter to the Star Tribune dated June 26, 1998 is attached hereto as Exhibit 26.

64. A true and correct copy of the materials sent by the Board of Judicial Standards to Greg Wersal under a cover letter dated July 1998 is attached hereto as Exhibit 27.

65. A true and correct copy of April Guerin's letter to Greg Wersal dated August 10, 1998 is attached hereto as Exhibit 28.

66. A true and correct copy of the Board of Judicial Standards Memorandum to 1998 Judicial Candidates dated August 20, 1998 is attached hereto as Exhibit 29.

67. A true and correct copy of Mark Wersal's letter to Republican BPOU chairpersons is attached hereto as Exhibit 30.

68. A true and correct copy of Adeline Lundquist letter to Greg Wersal postmarked September 16, 1998 is attached hereto as Exhibit 31.

69. A true and correct copy of the James E. Ramette's letter to Greg Wersal dated October 5, 1998 is attached hereto as Exhibit 32.

70. A true and correct copy of A.M. Keith's Letter to Greg Wersal dated October 20, 1998 is attached hereto as Exhibit 33.

71. A true and correct copy of the Star Tribune article dated November 12, 1997 is attached hereto as Exhibit 34.

72. A true and correct copy of the City Pages article dated November 19, 1997 is attached hereto as Exhibit 35.

73. A true and correct copy of the map used by Greg Wersal during the 1998 campaign is attached hereto as Exhibit 36.

74. A true and correct copy of Greg Wersal's letter to the editor dated February 10, 1998 is attached hereto as Exhibit 37.

75. A true and correct copy of the Star Tribune article dated February 26, 1998 is attached hereto as Exhibit 38.

76. A true and correct copy of Lee Larkey's letter to the St. Cloud Times dated March 2, 1998 is attached hereto as Exhibit 39.

77. A true and correct copy of the St. Cloud Times editorial dated March 30, 1998 is attached hereto as Exhibit 40

78. A true and correct copy of Greg Wersal's campaign literature are attached hereto as Exhibit 41.

79. A true and correct copy of the St. Paul Pioneer Press ("Pioneer Press") editorial dated May 1, 1998 is attached hereto as Exhibit 42.

80. A true and correct copy of Greg Wersal's opinion piece faxed on April 28, 1998, and later printed in the *Star Tribune* on May 3, 1998 is attached hereto as Exhibit 43.

81. A true and correct copy of Greg Wersal's letter to the Pioneer Press written in response to the May 1, 1998 editorial is attached hereto as Exhibit 44.

82. A true and correct copy of the Star Tribune Commentary page dated May 3, 1998 is attached hereto as Exhibit 45.

83. A true and correct copy of the Greg Wersal's letter to the Pioneer Press dated May 4, 1998 is attached hereto as Exhibit 46.

84. A true and correct copy of Noah Rosenbloom's letter to the Star Tribune dated May 8, 1998 is attached hereto as Exhibit 47.

85. A true and correct copy of D.J. Tice's Pioneer Press editorial dated May 6, 1998 is attached hereto as Exhibit 48.

86. A true and correct copy of Greg Wersal's opinion piece faxed May 11, 1998 is attached hereto as Exhibit 49.

87. True and correct copies of two of Greg Wersal's opinion pieces faxed May 13, 1998 is [sic] attached hereto as Exhibit 50.

88. A true and correct copy of Greg Wersal's speech to the Sentinel Club on May 20, 1998 is attached hereto as Exhibit 51.

89. A true and correct copy of a sample "Wersal for Supreme Court" campaign logo used on banner is attached hereto as Exhibit 52.

90. A true and correct copy of Greg Wersal's letter to the Pioneer Press dated May 19, 1998 is attached hereto as Exhibit 53.

91. A true and correct copy of Greg Wersal's opinion piece faxed May 20, 1998 is attached hereto as Exhibit 54.

92. A true and correct copy of Greg Wersal's formal speech announcing his candidacy on May 27, 1998 is attached hereto as Exhibit 55.

93. A true and correct copy of Greg Wersal's press release dated May 27, 1998 announcing his candidacy is attached hereto as Exhibit 56.

94. A true and correct copy of Greg Wersal's opinion piece faxed June 15, 1998 is attached hereto as Exhibit 57.

95. A true and correct copy of Greg Wersal's Pioneer Press editorial dated June 16, 1998 is attached hereto as Exhibit 58.

96. A true and correct copy of the City Pages article dated June 17, 1998 is attached hereto as Exhibit 59.

97. A true and correct copy of Dorothy McGlanchlin's letter to Greg Wersal dated June 20, 1998 is attached hereto as Exhibit 60.

98. A true and correct copy of Bruce A. Peterson's letter to the Star Tribune dated June 12, 1998 is attached hereto as Exhibit 61.

99. A true and correct copy of Greg Wersal's letter to the Star Tribune dated June 22, 1998 is attached hereto as Exhibit 62.

100. A true and correct copy of Greg Wersal's letter to Peg Cullen dated June 22, 1998 is attached hereto as Exhibit 63.

101. A true and correct copy of John Hultquist's letter to Joan A. Growe dated June 26, 1998 is attached hereto as Exhibit 64.

102. A true and correct copy of Greg Wersal's press release dated June 26, 1998 is attached hereto as Exhibit 65.

103. True and correct copies of three of Greg Wersal's opinion pieces faxed June 28, 1998 to newspapers throughout Minnesota are attached hereto as Exhibit 66.

104. A true and correct copy of the Waconia County News article is attached hereto as Exhibit 67.

105. A true and correct copy of the Notice of Appointment of Joan Ericksen Lancaster to the Minnesota Supreme Court dated July 1, 1998 is attached hereto as Exhibit 68.

106. A true and correct copy of Greg Wersal's fax to Bernie Steele dated July 2, 1998 is attached hereto as Exhibit 69.

107. A true and correct copy of the Northern Watch editorial dated July 4, 1998 is attached hereto as Exhibit 70.

108. A true and correct copy of Greg Wersal's press release dated July 7, 1998 is attached hereto as Exhibit 71.

109. A true and correct copy of Greg Wersal's Affidavit of Candidacy dated July 7, 1998 is attached hereto as Exhibit 72.

110. A true and correct copy of Greg Wersal's announcement speech dated July 7, 1998 is attached hereto as Exhibit 73.

111. A true and correct copy of the Star Tribune article dated July 8, 1998 is attached hereto as Exhibit 74.

112. A true and correct copy of the Minnesota Lawyer article and an article from the *St. Paul Pioneer Press* each dated July 8, 1998 is attached hereto as Exhibit 75.

113. True and correct copies of Greg Wersal's campaign materials are attached hereto as Exhibit 76.

114. True and correct copies of Greg Wersal's opinion pieces during the 1998 campaign are attached hereto as Exhibit 77.

115. A true and correct copy of the Pioneer Press article dated July 12 1998 is attached hereto as Exhibit 78.

116. A true and correct copy of Greg Wersal's letter to Roger Peterson dated July 17, 1998 is attached hereto as Exhibit 79.

117. A true and correct copy of Dennis McGrath's letter to Greg Wersal dated July 23, 1998 is attached hereto as Exhibit 80.

118. A true and correct copy of Marge Winkelman's letter to Greg Wersal dated July 28, 1998 is attached hereto as Exhibit 81.

119. A true and correct copy of Erin Bishop's letter to Greg Wersal is attached hereto as Exhibit 82.

120. A true and correct copy of Greg Wersal's letter to Tom Pritchard dated July 29, 1998 is attached hereto as Exhibit 83.

121. A true and correct copy of Greg Wersal's letter to James Tarsney dated July 30, 1998 is attached hereto as Exhibit 84.

122. A true and correct copy of the Fairbault County Register article dated August 10, 1998 and the Albert Lea article are attached hereto as Exhibit 85.

123. A true and correct copy of Greg Wersal's letter to Richard Hardin dated August 13, 1998 is attached hereto as Exhibit 86.

124. A true and correct copy of Greg Wersal's letter to Dean Trippler dated August 17, 1998 is attached hereto as Exhibit 87.

125. A true and correct copy of a Minnesota State Fair map which includes Greg Wersal's campaign logo is attached hereto as Exhibit 88.

126. A true and correct copy of Greg Wersal's fax to Pat Sweeney of the *St. Paul Pioneer Press* dated August 20, 1998 is attached hereto as Exhibit 89.

127. A true and correct copy of Crystal/Robbinsdale, New Hope/Golden Valley Sun-Post article dated August 19, 1998 is attached hereto as Exhibit 90.

128. A true and correct copy of the Brooklyn Center, Brooklyn Park Sun-Post article dated August 19, 1998 is attached hereto as Exhibit 91.

129. A true and correct copy of the Minnesota Lawyer article dated August 21, 1998 is attached hereto as Exhibit 92.

130. A true and correct copy of the Minnesota Lawyer article dated late August, 1998 is attached hereto as Exhibit 93.

131. A true and correct copy of the Star Tribune Voter's Guide confirmation letter postmarked August 31, 1998 is attached hereto as Exhibit 94.

132. A true and correct copy of the Minnesota Lawyer article dated August 28, 1998 is attached hereto as Exhibit 95.

133. A true and correct copy of Greg Wersal's letter to Jocelyn Knoll dated September 1, 1998 is attached hereto as Exhibit 96.

134. A true and correct copy of Cheryl Wersal's fax to Jerry Franzen dated September 1, 1998 is attached hereto as Exhibit 97.

135. A true and correct copy of the Pioneer Press Primary Election Voter's Guide dated September 3, 1998 is attached hereto as Exhibit 98.

136. A true and correct copy of the Minnesota Lawyer article dated September 4, 1998 is attached hereto as Exhibit 99.

137. A true and correct copy of the Star Tribune article dated September 7, 1998 is attached hereto as Exhibit 100.

138. A true and correct copy of Greg Wersal's letter to Midge Dean Dated September 8, 1998 is attached hereto as Exhibit 101.

139. A true and correct copy of Greg Wersal's letter to Susan Blanch dated September 8, 1998 is attached hereto as Exhibit 102.

140. A true and correct copy of Greg Wersal's campaign advertisement in the Crystal/Robbinsdale, New Hope/Golden Valley Sun-Post dated September 9, 1998 is attached hereto as Exhibit 103.

141. A true and correct copy of Deb Olson's letter to Greg Wersal postmarked September 10, 1998 is attached hereto as Exhibit 104.

142. A true and correct copy of the Star Tribune article dated September 10, 1998 is attached hereto as Exhibit 105.

143. A true and correct copy of the Star Tribune Primary Election Voter's Guide dated September 11, 1998 is attached hereto as Exhibit 106.

144. A true and correct copy of William E. Mullin's letter to the Star Tribune dated September 11, 1998 is attached hereto as Exhibit 107.

145. A true and correct copy of Greg Wersal's letter to the Star Tribune dated September 11, 1998 is attached hereto as Exhibit 108.

146. A true and correct copy of Jennifer J. Schnack's letter to the Star Tribune dated September 12, 1998 is attached hereto as Exhibit 109

147. A true and correct copy of Greg Wersal's press release dated September 14, 1998 is attached hereto as Exhibit 110.

148. A true and correct copy of Greg Wersal's primary election invitation to supporters dated September 8, 1998 is attached hereto as Exhibit 111.

149. A true and correct copy of Greg Wersal's letter dated September 22, 1998 is attached hereto as Exhibit 112.

150. A true and correct copy of Greg Wersal's press release dated October 16, 1998 is attached hereto as Exhibit 113.

151. A true and correct copy of the Minnesota Lawyer article dated September 18 1998 is attached hereto as Exhibit 114.

152. A true and correct copy of the Star Tribune article dated October 27, 1998 is attached hereto as Exhibit 115.

153. A true and correct copy of Greg Wersal's letter to the Star Tribune dated October 27, 1998 is attached hereto as Exhibit 116.

154. A true and correct copy of the Star Tribune endorsement of Alan Page for the Minnesota

Supreme Court dated October 29, 1998 is attached hereto as Exhibit 117.

155. A true and correct copy of the Pioneer Press article dated November 1, 1998 is attached hereto as Exhibit 118.

156. A true and correct copy of the Star Tribune article dated November 3, 1998 is attached hereto as Exhibit 119.

157. A true and correct copy of Greg Wersal's letter to Steven Rosenfeld dated December 1, 1998 is attached hereto as Exhibit 120.

158. True and correct copies of Greg Wersal's 1999 educational materials are attached hereto as Exhibit 121.

159. A true and correct copy of the Star Tribune article dated May 28, 1998 is attached hereto as Exhibit 122.

160. A true and correct copy of Corwin Hulbert's letter to the Star Tribune dated May 17, 1998 is attached hereto as Exhibit 123.

161. A true and correct copy of the Redwood Gazette article dated May 26, 1998 is attached hereto as Exhibit 124.

162. A true and correct copy of Greg Wersal's announcement invitation is attached hereto as Exhibit 125.

163. A true and correct copy of the Sleepy Eye newspaper article dated mid-June, 1998 is attached hereto as Exhibit 126.

164. A true and correct copy of Star Tribune Article dated June 27, 1998 is attached hereto as Exhibit 127.

165. A true and correct copy of the Star Tribune article dated May 1, 1998 is attached hereto as Exhibit 128.

166. A true and correct copy of the Pioneer Press article dated May 1, 1998 is attached hereto as Exhibit 129.

167. A true and correct copy of the Star Tribune article dated June 24, 1998 is attached hereto as Exhibit 130.

168. A true and correct copy of the Star Tribune article dated March 3, 1998 is attached hereto as Exhibit 131.

169. A true and correct copy of Bill Cooper's Pioneer Press editorial dated April 9, 1998 is attached hereto as Exhibit 132.

170. A true and correct copy of the Star Tribune article dated June 30, 1998 is attached hereto as Exhibit 133.

171. A true and correct copy of Greg Wersal's letter to Aaron Frederickson dated January 23, 1998 is attached hereto as Exhibit 134.

172. A true and correct copy of the Crystal-New Hope East Plymouth League of Women Voter's February – March 1998 Newsletter is attached hereto as Exhibit 135.

173. A true and correct copy of Waren Higgins' fax to Greg Wersal dated March 18, 1998 is attached hereto as Exhibit 136.

174. A true and correct copy of Waren Higgins' fax to Greg Wersal dated April 21, 1998 is attached hereto as Exhibit 137.

175. A true and correct copy of the Minnesota Family Council Newsletter dated May 1998 is attached hereto as Exhibit 138.

176. A true and correct copy of Greg Wersal's letter to Helen Palmer dated May 4, 1998 is attached hereto as Exhibit 139.

177. A true and correct copy of the League of Women Voter's Judicial Questionnaire sent to Greg Wersal under Judy Duffy's cover letter dated July 12, 1998 is attached hereto as Exhibit 140.

178. A true and correct copy of Stacey Poper Home's letter to Greg Wersal dated July 23, 1998 is attached hereto as Exhibit 141.

179. A true and correct copy of the League of Women Voter's letter to Greg Wersal dated August 2, 1998 is attached hereto as Exhibit 142.

180. A true and correct copy of Minnesota Women Lawyers New Advisory dated September 4, 1998 is attached hereto as Exhibit 143.

181. A true and correct copy of David Skillings letter to Greg Wersal dated July 14, 1998 is attached hereto as Exhibit 144.

182. A true and correct copy of the Coalition of Minnesota Business, Inc.'s letter to Greg Wersal dated October 22, 1998 is attached hereto as Exhibit 145.

183. A true and correct copy of the League of Women Voter's letter to Greg Wersal dated November 30, 1998 is attached hereto as Exhibit 146.

184. A true and correct copy of "Changing Minnesota's Judges" sent under a cover letter dated November 6, 1998 is attached hereto as Exhibit 147.

185. A true and correct copy of Article 7, Section 6 of the Minnesota Constitution and Minnesota Statutes Sections 2116.01 and 2116.02 is attached hereto as Exhibit 148.

186. A true and correct copy of the Appointment of members of the Judicial Recall Rules Committee dated February 11, 1998 is attached hereto as Exhibit 149.

187. A true and correct copy of the Promulgation of Grounds for Judicial Recall dated July 1, 1998 is attached hereto as Exhibit 150.

188. A true and correct copy of Greg Wersal's press release dated July 15, 1998 is attached hereto as Exhibit 152.

189. A true and correct copy of the Motion for a Public Hearing, Motion for Reconsideration of Grounds for Judicial Recall, Motion for present Oral Argument, Motion for Release dated July 15, 1998 is attached hereto as Exhibit 152.

190. A true and correct copy of Greg Wersal's speech dated July 15, 1998 is attached hereto as Exhibit 153.

191. A true and correct copy of Greg Wersal's press release dated July 24, 1998 is attached hereto as Exhibit 154.

192. A true and correct copy of fax log reports dated July 24, 1998 is attached hereto as Exhibit 155.

193. A true and correct copy of the Star Tribune article dated July 25, 1998 is attached hereto as Exhibit 156.

194. A true and correct copy of the Norwood Young America Times article dated July 30, 1998 is attached hereto as Exhibit 157.

195. A true and correct copy of Greg Wersal's press release dated August 19, 1998 is attached hereto as Exhibit 158.

196. A true and correct copy of the Page Education Foundation letter dated November 5, 1998 is attached hereto as Exhibit 159.

197. A true and correct copy of the City Pages article dated July 30, 1997 is attached hereto as Exhibit 160.

198. A true and correct copy of the Page Education Foundation's fundraising totals is attached hereto as Exhibit 161.

199. A true and correct copy of Greg Wersal's letter to Minnesota Board of Judicial Standards dated August 18, 1998 is attached hereto as Exhibit 162.

200. A true and correct copy of Greg Wersal's Ethical Complaint against Alan Page dated August 18, 1998 is attached hereto as Exhibit 163.

201. A true and correct copy of DePaul Willette's letter to Greg Wersal dated August 19, 1998 is attached hereto as Exhibit 164.

202. A true and correct copy of the Star Tribune article dated August 20, 1998 is attached hereto as Exhibit 165.

203. A true and correct copy of the St. Paul Legal Ledger article dated August 20, 1998 is attached hereto as Exhibit 166.

204. A true and correct copy of Greg Wersal's letter to DePaul Willette of the board on Judicial Standards and DePaul Willette's letter to Greg Wersal dated August 26, 1998 is attached hereto as Exhibit 167.

205. A true and correct copy of Alfred Stanberry's letter to Justice Kathleen Blatz dated September 17, 1998 is attached hereto as Exhibit 168.

206. A true and correct copy of the Alfred Stanberry's letter to the Internal Revenue Service dated October 9, 1998 is attached hereto as Exhibit 169.

207. True and correct copies of two of Greg Wersal's commentaries sent to newspapers throughout the state are attached hereto as Exhibit 170.

208. A true and correct copy of DePaul Willette's letter to Greg Wersal dated October 14, 1998 is attached hereto as Exhibit 171.

209. A true and correct copy of Additional Ethical Complaint against Alan Page dated November 5, 1998 is attached hereto as Exhibit 172.

210. A true and correct copy of DePaul Willette's letter to Greg Wersal dated November 10, 1998 is attached hereto as Exhibit 173.

211. A true and correct copy of Alfred Stanburg's fax to Greg Wersal dated December 10, 1998 is attached hereto as Exhibit 174.

212. A true and correct copy of the Board of Judicial Standards' presentation to the Hennepin County Bar Association Professional Conduct Committee dated April 17, 1998 is attached hereto as Exhibit 175.

213. A true and correct copy of the Minnesota State Bar Association ("MSBA") Judicial Elections Task Force Recommendations adopted June 19, 1998 is attached hereto as Exhibit 176.

214. A true and correct copy of the Hennepin Lawyer article dated October 1997 is attached hereto as Exhibit 177.

215. A true and correct copy of Timothy J. Eiden's letter to Judge Marilyn K. Knudson and Michael Orge

dated October 15, 1997 is attached hereto as Exhibit 178.

216. A true and correct copy of the Star Tribune article dated June 2, 1998 is attached hereto as Exhibit 179.

217. A true and correct copy of the MSBA Court Rules and Administration Meeting summary dated June 17, 1997 is attached hereto as Exhibit 180.

218. A true and correct copy of the Bench & Bar article dated April 1998 is attached hereto as Exhibit 181.

219. A true and correct copy of the MSBA Executive Committee Report on proposed amendments of Canon 5 faxed to Greg Wersal June 10, 1998 is attached hereto as Exhibit 182.

220. A true and correct copy of Greg Wersal's press release dated late June, 1998 is attached hereto as Exhibit 183.

221. A true and correct copy of the MSBA 1998 Convention agenda is attached hereto as Exhibit 184.

222. A true and correct copy of the Bench & Bar article dated May/June 1998 is attached hereto as Exhibit 185.

223. A true and correct copy of the Motion to Amend the Recommendation of the Executive Committee regarding Canon 5 is attached hereto as Exhibit 186.

224. A true and correct copy of the Bench and Bar article dated May/June 1998 is attached hereto as Exhibit 187.

225. A true and correct copy of the Bench & Bar article dated August 1998 is attached hereto as Exhibit 188.

226. A true and correct copy of Greg Wersal's press release dated June 26, 1998 is attached hereto as Exhibit 189.

227. A true and correct copy of the George Soule's letter to Greg Wersal dated August 24, 1998 is attached hereto as Exhibit 190.

228. A true and correct copy of the Bench & Bar article dated October 1998 is attached hereto as Exhibit 191.

229. A true and correct copy of the June 13, 1998 WCCO audio tape is attached as Exhibit 192.

230. A true and correct copy of the "Almanac" program from July 10, 1998 is attached as Exhibit 193.

231. A true and correct copy of Star Tribune article is attached as Exhibit 194.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: January 27, 1999

/s/ Gregory F. Wersal
GREGORY F. WERSAL

EXHIBIT 1

GREG WERSAL'S ADDRESS TO REPUBLICAN PARTY CONVENTION DELEGATES IN 1996

Good morning ladies and gentleman, [sic] my name is Greg Wersal, and I am running for the position of Associate Justice to the Minnesota Supreme Court. At the end of this speech I will be asking for your help. Now I know that before this day is done, you will [sic] hearing that same request from numerous candidates. So I fully understand when you ask why you should support me.

The reason is that a judicial candidate may be more important than any candidate you could elect to the State Legislature. Let me give you an example. In the past, when you said you were concerned about crime, you went to your State Legislature and they passed laws to get tough on crime. But it is the Minnesota Supreme Court that determines if these laws are constitutional or unconstitutional. And when you said you were concerned about welfare and that Minnesota's welfare benefits were so high that they attract people to our state from surrounding states, you went to your State Legislature and they passed a law. And the Minnesota Supreme Court struck that law down as unconstitutional. And when you said you were concerned about abortion and you told your State Legislature that you did not want public funds being used to pay for abortions, you went to your State Legislature and they passed a law. And the Minnesota Supreme Court declared that unconstitutional.

Ladies and gentlemen, you do not need more people in the State Legislature; and, for heavens sake, you do not need more judges who try to legislate from the bench. What you need are judges who will strictly construe the Constitution. Judges who will defer to the will of the citizens of this state as expressed through their legislature. And judges who understand that the people of this state have a legitimate expectation that criminals will be punished.

Some of you ~~will~~ object to my candidacy. Some ~~will~~ even object to my very presence at this convention. But I believe I should be here today. When Abraham Lincoln spoke of a government by, of and for the people, he recognized that the legitimate power of government

comes from the people. I should be here today and so should all judicial candidates because in a democracy no one has the right or the authority to sit on the ~~Minnesota Supreme Court~~ [highest court of this state and judge you], except that you give it to them.

Some of you have said to me "Greg, the problem is we really don't know you". But ladies and gentlemen, you do know what I stand for. And you know in your hearts and in your minds that what I have told you is true.

At the end of this speech you will applaud. But I need more than your applause. I have one voice and you have many. I need you to join your voice with mine. I need you to get up out of your chairs and tell the person next to you, tell your party leaders, tell the press that are observing this convention, that today you have seen the most amazing thing. Tell them that today you saw this guy named Greg Wersal who is running for the Minnesota Supreme Court and you heard what he had to say. And despite the fact that he is an attorney, he actually made some sense.

EXHIBIT 2

[Convention Speech 1997
given to Congressional District Convention]

"The first thing we'll do is kill all the lawyers." Ladies and gentlemen, my name is Greg Wersal, I am a lawyer[,] and have been for sixteen years[,] and am a candidate for the Minnesota Supreme Court. At the risk of never leaving this convention hall alive, let me repeat that line from

one of William Shakespeare's plays, "The first thing we'll do is kill all the lawyers". That line is said by a character who is dreaming about what he will do when he becomes king. And he decides that when he becomes king, the first thing he'll do is kill all the lawyers. You see, he doesn't want to be just a king, he wants to be a tyrant. And he realizes that unless he can control the law he will never have complete political ~~control~~ [power].

Luckily, today we do not have tyrants, we live in a democracy. [Or do we?]

Is it a democracy when a single federal judge can strike down the presidential line item veto law which was recently passed by Congress? Is it a democracy when a handful of judges in Hawaii can tell 260 million Americans that they are wrong about the essential elements of a marriage? And is it a democracy when six judges on the Minnesota Supreme Court can tell you that you must spend state funds to pay for abortions despite the fact that your Legislature passed a law to the contrary?

Ladies and gentlemen you may think you live in a democracy, but you [do not] ~~don't~~. In fact, many would argue that it is our judges[,] who have [taken] ~~assumed~~ control of the law and have abandoned our Constitution[,] who have become our modern day tyrants.

If there is a solution to this problem it lies with judicial elections. The judges on the Minnesota Supreme Court do stand for election. In fact, when you next vote for a governor you will also be voting for five judges on the Minnesota Supreme Court. There are only seven judges. If you could elect five judges, think of the impact you would have.

If you want to live in a democracy then you must actively seek out and elect judges who will listen to you when you speak through your Legislature and not themselves legislate from the bench. If you want to live in a constitutional democracy, then you must actively seek out and elect judges who will strictly construe the constitution. In short, if you want to govern yourselves, if you want to be your own rulers, rather than be ruled by a group of judges, then ~~you need to~~ [the last thing you need to do is] get actively involved in judicial elections.

EXHIBIT 13

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
[Address And Names Omitted In Printing]

March 31, 1998

Gregory F. Wersal, Esq.
Wersal Law Office, P.A.
P.O. Box 26186
Minneapolis, MN 55426

Re: Letter of March 27, 1998

Dear Mr. Wersal:

I am in receipt of your letter dated March 27, 1998, wherein you ask for an advisory opinion as it regards certain portions of Canon 5 of the code of Judicial Conduct.

As you are well aware, there is pending litigation over the constitutionality of certain portions of Canon 5. You are a plaintiff in this action and you have sued, among others, me as Director of the Office of Lawyers Professional Responsibility and Charles Lundberg as the Chair of the Board of Lawyers Professional Responsibility. Due to this pending litigation, I will not be answering your request for an advisory opinion at this time.

Sincerely yours,

/s/ Edward J. Cleary
Edward J. Cleary
Director

jmc

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, et al.,

Plaintiffs,

vs.

Civ. No. 98-931 (MJD)

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; CHARLES E. LUNDBERG, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and EDWARD J. CLEARY, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants.

The Deposition of GREGORY F. WERSAL, taken pursuant to Notice of Taking Deposition, taken before Kerri L. Brodock, a Notary Public in and for the County of Hennepin, State of Minnesota, taken on the 25th day of January, 1999, at 525 Park Street, Suite 500, Saint Paul, Minnesota, commencing at approximately 1:00 p.m.

[2] APPEARANCES:

ERICK G. KARRDAL, ESQUIRE, of the Law Firm of TRIMBLE & ASSOCIATES, LTD., 11700 Wayzata Boulevard, Minnetonka, Minnesota 55305, appeared or and on behalf of Plaintiff, Republican Party of Minnesota.

WILLIAM F. MOHRMAN, ESQUIRE, of MOHRMAN & CO., P.A., 4100 Multifoods Tower, 35 South Sixth Street, Minneapolis, Minnesota 55402, appeared for and on behalf of Plaintiff, Gregory F. Wersal.

MARK B. LEVINGER, ESQUIRE, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, Saint Paul, Minnesota 55101-2128, appeared for and on behalf of Defendant, Verna Kelly.

THOMAS C. VASALY, ESQUIRE, Assistant Attorney General, 525 Park Street, Suite 500, Saint Paul, Minnesota 55103-2106, appeared for and on behalf of Defendants, Charles E. Lundberg and Edward J. Cleary.

*The Original is in the possession of Attorney Thomas C. Vasaly."

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[3] (At this time Wersal Deposition Exhibit Numbers 1-4 were marked for identification by the Court Reporter.)

GREGORY F. WERSAL,

the Witness in the above-entitled matter after having been first duly sworn deposes and says as follows:

CROSS-EXAMINATION

BY MR. VASALY:

Q. Mr. Wersal, would you like to state your full name and address for the record?

A. It's Gregory F. Wersal, W-E-R-S-A-L. You want my home address?

Q. Whatever you prefer.

A. I would actually prefer my office address if that's okay. It's 7841 Wayzata Boulevard, Suite 201, P.O. Box 26186, Saint Louis Park, Minnesota 55426.

Q. Mr. Wersal, are you in practice by yourself or do you have partners?

A. I practice with my brother Mark Wersal.

Q. Are there any other attorneys that are associated or Of Counsel with the firm?

A. No.

[4] Q. Well, let's go through these exhibits first of all. Do you have Exhibit 1 before you, Mr. Wersal? It's

identified as Deposition Exhibit 1 and at the top it states Gregory Wersal's Campaign For Justice, Judicial Elections, The Only Means To Judicial Accountability. Mr. Wersal, can you identify that flier?

A. Just give me a second.

Q. Sure.

A. I think I can, yes.

Q. What is it?

A. It appears to be a copy of a flier that was used during my campaign and I'm trying to remember what year. I'm not sure if it was used in the '98 campaign, it might have only been used in '97 or prior. I'm not sure.

MR. MOHRMAN: You mean '97 or '96?

A. Well, or prior. It may have been '97. To be honest with you, I can't remember exactly, but it was used at some point in time. And I do want to qualify one thing and I know I'm not sure where you got these from and my concern is that literally every piece that my campaign sent out of any material sometimes went through several drafts or versions which were then submitted not only to my eyes but the eyes of maybe two, three, four other attorneys and then changes would have been made and my only concern would be that this appears to be what we sent out, but without [5] comparing it to the original, I don't – I'm willing to accept responsibility for the exact words I used, but because of the ethical questions that are going to be involved in much of your questions and much of what I did. I am concerned about whether or not this is the exact same words, okay?

BY MR. VASALY:

Q. All right. Well, I'll tell you where I got it. It doesn't appear in the record anywhere but it was mailed to me by a person who stated that he received the fliers at the Republican convention and at the Republican district convention this year. I have no firsthand knowledge myself as to whether those representations are true. The original documents that I received are before the Court Reporter and marked as Exhibits 1, 2 and 3 and Exhibit 4, as I understand it, is taken from the appendix to one of the Plaintiff's briefs when this was on appeal.

MR. MOHRMAN: Actually, Greg, why don't you look at the originals as opposed to –

THE WITNESS: Oh, we have originals.

MR. MOHRMAN: Mr. Vasaly, was this – the person you received this from, did they file an ethical complaint against Mr. Wersal?

MR. VASALY: I have no knowledge of that and I wouldn't have knowledge of that.

[6] MR. MOHRMAN: Why would you not have knowledge of that?

MR. VASALY: I represent the Lawyers Board as their attorney in this litigation, I'm not a staff attorney in their office and I'm not familiar with their workings. If a complaint was filed against Mr. Wersal, Mr. Wersal would be notified, not me.

MR. MOHRMAN: I thought you represented that you were not going to produce any ethical files in conjunction with discovery in this case and what I'm

inquiring into is if there is an open ethics investigation against Mr. Wersal and this document has been obtained from it, I think you've waived your objection to that and I want to see the rest of the documents.

MR. VASALY: Well, first of all, it hasn't, and secondly, it would be Mr. Wersal who would have access to that file –

MR. MOHRMAN: I understand.

MR. VASALY: – not me, so Mr. Wersal is the one person who would know if a complaint had been filed against him. He would know if there is an open file concerning him at the Lawyers Board, I don't.

MR. MOHRMAN: Actually, that's not true. My understanding, the Lawyers Board will open up investigations and then make a decision whether they're [7] going to move forward or not move forward before they notify somebody that there has been an investigation open and so that's why I asked, and as I said earlier. I'm just trying to be real clear of the position of the Lawyers Board and I believe the Judicial Board and if they're going to open up ethic files and you start to produce documents from ethics files, then I think you open a door.

MR. VASALY: Let me be clear. It doesn't come from any ethics file, and no, it is not correct. The Lawyers Board does not investigate attorneys without notifying them, that's not correct. They do when a complaint is received and they determine to dismiss it without investigation, they notify the complainant and respondent simultaneously and there will be an interim of time while the documents are being prepared.

MR. MOHRMAN: That's what I'm referring to.

MR. VASALY: There is an interval to draft documents and sign them and mail them and during that period of time, the respondent and complainant would not know, but it's not a case of me being privy to an investigation Mr. Wersal would not be privy to.

MR. MOHRMAN: Let me be clear about what I said. My understanding is there is an interval of time from when the complainant filed the complaint, it's Mr. Wersal [8] who wouldn't know about it and I do not know what that length of time is, but my understanding is it's longer than a few days and maybe even longer than a few months, so that's why I asked the question about whether or not these materials have been received from ethics investigations and I don't know that period of time but I know there is a period of time and I want to make sure that if you're going to start to produce stuff from the ethics investigation files, we want to see them.

MR. VASALY: I guess we can talk about it more later, but I'm just going to try to be clear. No, the complainant would not be informed of an investigation before the respondent would be informed of an investigation. The complainant and respondent are informed simultaneously, there would be no investigation prior to a summary dismissal.

MR. MOHRMAN: The complainant would know that they filed a complaint.

MR. VASALY: Yes, but they wouldn't know whether an investigation was taking place.

MR. MOHRMAN: And the respondent wouldn't know.

MR. KAARDAL: I have an easy question. The Minnesota Lawyers Professional Responsibility Board or the Office of Lawyers Professional Responsibility, if they [9] have information about ethical conduct, can the office itself initiate a complaint?

MR. VASALY: Yes, like, in fact, I think that's universally with licensing boards that any person can file a complaint including a member of the staff or member of the Board. The Lawyers Board has permitted under the rules to conduct his or her own investigation.

MR. KAARDAL: For the basis of an ethical complaint against Greg Wersal?

MR. VASALY: No.

MR. KAARDAL: No further questions. Thanks.

BY MR. VASALY:

Q. Mr. Wersal, turning to Deposition Exhibit 1, is there anything – I'm not sure whether we completed this or not. Is there anything further you want to add from anything you've already stated?

MR. MOHRMAN: Well, objection, vagueness. What do you mean by identify, identify how?

BY MR. VASALY:

Q. Mr. Wersal, are you able to answer the question?

MR. MOHRMAN: Do you understand my objection? I mean, identify in terms of time, who was the source of this, that sort of thing?

[10] A. I do note the following: On the back of the document it refers to my wife and I having been married for 12 years and we've now been married 15. And I also remember this language and it was used I'm quite certain in '96.

BY MR. VASALY:

Q. Okay. Now, Mr. Wersal, turning to the text of Exhibit 1, is there anything in there which, in your opinion, would constitute a violation of the judicial canon as presently worded?

MR. MOHRMAN: Objection, calls for a legal conclusion from Mr. Wersal.

MR. KAARDAL: Same objection.

MR. MOHRMAN: Answer it if you can.

A. Absolutely not.

BY MR. VASALY:

Q. And did the existence of the canon prevent you or limit you in your promulgation of the flier that's before us as Exhibit 1?

A. Absolutely.

Q. How did it do that?

A. Because in the flier I was not able to state in detail my opinion about the various cases that are described in the flier.

Q. It's the amount of detail that limited you?

A. It is my – yes, absolutely. It is my feeling [11] that my ability to discuss legal cases under the rules other

than perhaps to state the facts and the existence of the case and what the Court held or a dissent held is very limited so that – because right now the rules say I am not to announce my views on legal and political issues so it becomes very, very difficult not to discuss cases.

Q. Was it the purpose of the flier to indicate your disagreement with the three decisions that are alluded to on crime, welfare and abortion?

A. It was my purpose to do two things I think. First was to tell people that they have a legal right to elect judges and that they should exercise that right and that judges are out there making decisions that may concern them or may not concern them, but that their only ability to have an impact is through an election process. To be frank, I tried desperately not to state my opinion in anything we handed out about cases and the decisions in cases.

Q. Was it your intent in the flier to indicate disagreement with the three Supreme Court decisions that are alluded to in the flier on crime, welfare and abortion?

A. It was – no, that wasn't my intent.

Q. Okay. It was intended to be a neutral statement of the Court's opinion on those three cases?

A. Again, I don't think it indicates anywhere my opinion about those cases. It gives sometimes a statement [12] from a dissenting judge and I want you to understand that my concern with many cases is not the holding of the case, it was the process at which the decision was arrived at.

Q. Do you believe that the three cases that are listed there could be characterized as decisions which are marked by the disregard for the legislature and lack of common sense?

A. Are you asking for my personal opinion or are you asking whether people could reasonably believe that?

Q. I am asking whether that was the purpose of the flier, to indicate that the three decisions that are listed there are examples of decisions that are marked by disregard for the legislature and lack of common sense, but I would be happy to ask the other question. Maybe it's just me, but I read this and I assumed you had an unflattering opinion of these three. Was that just me or was that intentional?

A. Again, my concern – I'll just try to stress it again. My concern is not necessarily with the outcome, it's with how it's arrived at in the process and a correct reflexion [sic] between what role the legislature should play in a constitutional government and what role the Court should play in a constitutional government.

Q. Is the flier critical of the three decisions that are referred to?

MR. MOHRMAN: I'll note an objection to [13] that. The flier speaks for itself.

BY MR. VASALY:

Q. Mr. Wersal?

MR. MOHRMAN: Do you understand his question? I don't know how he can answer that question, Tom. If you want to rephrase the question, go ahead.

BY MR. VASALY:

Q. Mr. Wersal?

A. What's the question?

MR. MOHRMAN: Why don't you read the question back, and before you do, I want to note my objection is he's asking is the flier critical and my objection is the flier speaks for itself, so I think, Tom, if you want to ask him what his opinion was or his intent was, that's a different matter.

(Whereupon the requested portion of the record was read by the Court Reporter.)

A. I think the statements given there are simply statements of fact about what the Court did. The fact that somebody might look at them and say they're critical is because they, as many people might, disagree with the decision the Supreme Court made.

BY MR. VASALY:

Q. Would you say the flier is critical of the three decisions that are alluded to?

[14] A. My personal opinion of those decisions?

Q. No, of the flier.

A. I think I just answered that which is I think the flier simply sets out facts.

Q. So is that a no?

MR. MOHRMAN: Counsel, asked and answered.

BY MR. VASALY:

Q. Is the answer to the last question a no?

MR. MOHRMAN: Counsel, asked and answered.

MR. VASALY: I haven't heard a response.

MR. MOHRMAN: No, no, wait a minute.

MR. VASALY: Are you instructing him not to answer?

MR. MOHRMAN: No, I'm asking you to ask another question. You're trying to badger him to give an answer to the question that you want to hear. This is a deposition and you get to ask questions and he gets to answer. If you don't like his answers, that's fine, you can make a motion before the Court, but I'm not going to have you lean forward and give kind of sarcastic responses to my client in an attempt to badger.

MR. VASALY: I wasn't leaning forward.

BY MR. VASALY:

Q. My question is: Was that a no?

[15] MR. MOHRMAN: Counsel, please don't interrupt me, it's rude to the Court Reporter and it's not part of the process here and I will do my best to give you the same courtesy. Earlier in this deposition today you kind of looked at my client and said, "Well, maybe it's just me," and stuff, okay? That was sarcastic and I didn't comment on it at the time because I didn't want to start this kind of going back and forth. You asked is the answer to the question no, he answered your question. If

you want to rephrase the question and ask it differently, that's fine.

BY MR. VASALY:

Q. Mr. Wersal, is it correct that your answer to the question is this flier critical of the three decisions no?

A. I don't think there is enough information here to tell necessarily whether it's critical or not critical. I think – and that was part of the problem which is that other than giving a rendition of facts, which I think is what happened here with these cases, that a candidate such as myself is unable to discuss in any detail their criticism of cases.

Q. So you're not able to answer yes or no of whether the flier is critical of the decisions?

A. Again, I think that the three decisions that [16] are discussed we discussed simply as statement of facts about what the Supreme Court ruled.

Q. Do you believe it's neutral in content?

A. Is it neutral?

MR. MOHRMAN: Which content are you referring to, Counsel, the entire flier or the three references that are made to crime, welfare and abortion?

MR. VASALY: Let's see if Mr. Wersal can answer it as phrased.

MR. MOHRMAN: Read the question back, ma'am.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MOHRMAN: Objection, vague. Do you understand the question, Greg? Mr. Vasaly has asked you a question that, in my opinion, is vague, it's unclear whether he's asking you whether the whole flier is neutral in its content regarding criticism or whether it's referring to those three decisions and you certainly are free to ask Mr. Vasaly to rephrase the question.

MR. KAARDAL: Same objection, and I would also like to note that one could – just same objection.

MR. MOHRMAN: What's that?

MR. KAARDAL: I just want to assist. One of the problems with the questions about the whole flier is [17] that it obviously isn't neutral in some senses and in parts of it may be non-neutral and other parts might be neutral and it might help to move into and identify particular sentences.

BY MR. VASALY:

Q. Mr. Wersal, are you able to answer the question?

A. If you could specify which part of the exhibit, I will do my best to answer.

Q. Was it a neutral description – was the flier intended to be a neutral description of the three cases that you refer to?

MR. KAARDAL: I have to object to vagueness. You could disagree with the – there are two possible things he could concur with, the result and then the procedure. That's the end of my objection.

MR. MOHRMAN: Could you read the question back again.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MOHRMAN: Again, I would object on vagueness grounds. I mean, clearly the flier itself was intended to get elected, so in that sense it wasn't neutral and I wish, Tom, I'm kind of begging you here to sharpen your questions.

[18] BY MR. VASALY:

Q. Mr. Wersal?

MR. MOHRMAN: If you can answer, Greg.

A. Well –

MR. MOHRMAN: Let me tell you as your lawyer, this isn't a history exam, you don't have to answer questions if you don't understand them. You are more than entitled to ask Mr. Vasaly, tell him why you don't understand his questions and if he sits there and continues to look at you and say I expect an answer, you can say "Hey, look, I don't understand your question."

A. Well, again, I think the document speaks for itself. I think some people are going to look at this and I think the part that deals with the cases is a factual rendition of what occurred in those cases. Some people may agree with that outcome, some people may disagree. Some people may agree with the process that was used to arrive at those decisions, some might disagree.

BY MR. VASALY:

Q. Perhaps it would be a little more efficient at this point to answer the questions yes, no, or you can't

answer to close the line of questioning. If you can't answer, say so.

MR. MOHRMAN: He has answered and you don't like his answer and we've asked you to rephrase the [19] questions to focus in on particular parts of the flier and you've refused to do it.

MR. VASALY: Perhaps Mr. Wersal could repeat the answer.

BY MR. VASALY:

Q. Did you intend it to – was the flier intended to be a neutral description of the three cases that are alluded to in Exhibit 1?

MR. MOHRMAN: Objection, asked and answered, vague.

MR. KAARDAL: Same objection on vagueness. I'm concerned about the issue again about procedure and the decision itself. With the result of the Court's decision and the procedure and the threat today of an ethical violation being filed by the Office of Lawyers Professional Responsibility Board and the Lawyers Professional Responsibility Board, an answer here could be misconstrued against Mr. Wersal's interest and my client's as well. End of objection.

BY MR. VASALY:

Q. Mr. Wersal?

MR. MOHRMAN: If you don't understand the question, you can keep telling him you don't understand.

A. I don't understand your question.

BY MR. VASALY:

[20] Q. Okay, you don't understand the question?

A. Right, I'm sorry. Especially, I'm sitting here going – with the objections, I guess I don't understand, I'm sorry. I mean, let's face it, the flier was meant to appeal to some people, right.

Q. Okay.

A. It was going to turn other people off, so . . .

Q. Was it meant to appeal to people who might not like the decisions that you refer to?

MR. MOHRMAN: You're asking him what his intention was in issuing – well, you haven't even asked him yet whether he drafted the flier, so . . .

A. I'm sorry, what's your question, sir?

MR. VASALY: Can we have it back.

(Whereupon the requested portion of the record was read by the Court Reporter.)

A. Sure, a campaign flier is meant to appeal to people.

BY MR. VASALY:

Q. Now, if there had been no restrictions of Canon 5 governing the flier, what else would you have said in there about those decisions?

A. I probably would have said what I thought about those cases.

Q. Specifically?

[21] MR. MOHRMAN: Is that a question, Counsel, a one-word question?

BY MR. VASALY:

Q. Specifically what did you think about those three cases that you wanted to include in the flier?

MR. MOHRMAN: Objection. Greg, first of all, if you remember the cases, you can answer. And secondly, if you think you can answer here today as to what you thought about those cases, if you can, go ahead and answer.

A. Well, I don't have the cases in front of me, but I know that one of my primary concerns about most of these cases was the process by which they were decided.

BY MR. VASALY:

Q. And did Canon 5 limit you in expressing your disagreement with the process when you were promulgating Exhibit 1?

A. Absolutely.

Q. But for Canon 5, you would have expressed disagreement with the process with respect to those three cases?

A. Yeah.

Q. All right. In addition to the process, is there anything else that you would have added to the flier but for Canon 5?

[22] MR. MOHRMAN: Can you ask the question back again?

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MOHRMAN: Tom, here is my objection to that question, it's directed at the flier. Now, perhaps if you want to rephrase it in terms of but for Canon 5, is there anything else that you would have wanted to tell the voters in Minnesota regarding the issues in these cases. I mean, tied to the flier, you don't know if you can put it in a flier or a different flier or that sort of thing.

MR. VASALY: Well, I'll stick with the question as worded for now.

MR. MOHRMAN: You can answer the question, Greg.

A. Well, the question is very general and there were probably many things that I would have wanted to add, one being that the flier is not from me, it's from my campaign committee and it probably would have been more powerful if I had been able to ask people to work on my campaign or to contribute money as opposed to a piece coming from my campaign committee. In fact, you know, most political literature you're going to see, the candidate signs it, not the campaign committee.

BY MR. VASALY:

[23] Q. Did you approve Exhibit 1 before it was publicized?

MR. MOHRMAN: Objection. Greg, be very, very careful how you answer this question because I recall I may have even seen this piece of literature in the '98 campaign cycle at a Republican function, so when he asks you this, I'm really concerned with Mr. Vasaly's use

of verbs here and I hope it's not deliberate. When you say publicized, you make sure you did because once you release Exhibit 1 in what you believe to be 1996, you don't have any say if some other goofball gets ahold of it and starts making copies of this thing and distributes it two years later.

MR. KAARDAL: I also object on the grounds of vagueness on behalf of all the members of the Republican Party including my client, Mark Wersal and Crow and Holbert, vagueness.

A. Mr. Vasaly, could you try to be more specific?

BY MR. VASALY:

Q. Now, Mr. Wersal, you believe that this was publicized for the first time in 1996?

A. That's correct.

Q. And before it was publicized, did you approve it?

A. After consulting with probably two or three [24] other attorneys, yes.

Q. You approved it?

A. Yes.

Q. Okay. Did you approve its distribution in 1998?

A. Not that I know of.

Q. Do you have an explanation for the possibility that it could be distributed in 1998 without your approval?

A. Well, in 1996 I maybe handed out – I don't know. I have no idea how many of these might have been handed out, it might have been 10 and it might have been 5,000, and so a lot of people had my literature in their hands after the stuff was handed out in '96.

Q. As you sit here today, do you have any knowledge that any persons were distributing literature on your behalf that you had not approved for distribution in 1998?

MR. MOHRMAN: Could you read the question back.

(Whereupon the requested portion of the record was read by the Court reporter.)

MR. MOHRMAN: Counsel, I would ask you to rephrase that question, that question is extremely vague. It's vague in terms of the time and what time in 1998.

BY MR. VASALY:

[25] Q. Mr. Wersal, are you able to answer?

MR. MOHRMAN: I'm instructing you not to answer that question.

BY MR. VASALY:

Q. Mr. Wersal, do you have any knowledge of anybody at any time distributing literature on your behalf without your approval?

MR. KAARDAL: I object on grounds of vagueness with respect to time again.

MR. MOHRMAN: I think you can answer that question. He's asking you if there has been ever any time

that you're aware of any person distributing something without your approval.

A. Yes, I am.

BY MR. VASALY:

Q. Please describe that.

A. Some literature I know was distributed at – by who, I don't know – at some conventions in 1998 and came to my attention when – I'm trying to remember how it came to my attention. I mean, again, I just heard that pieces were distributed from other people.

Q. Let's turn to Exhibit 2. Mr. Wersal, can you identify Exhibit 2?

A. Yes, I can.

Q. What is it?

[26] A. It's a flier which was mailed out by my campaign in 1998.

Q. Did you approve it?

A. After consulting with probably one, two or more other attorneys, yes.

Q. Let's turn to Exhibit 3. First of all – I'll ask you a compound question. First of all, can you identify it, and secondly, is it complete?

MR. MOHRMAN: Answer the questions one at a time.

A. Just give me a second here. It appears to be a photocopy of a piece of literature which was mailed out

and without trying to do some checking, I'm not sure of the year, and it is not complete, there should have been a second page to it.

BY MR. VASALY:

Q. Would it have been mailed out either in 1996 or 1998?

MR. MOHRMAN: If you know.

A. As I sit here, I'm not sure, and you left out the year 1997, because again, I was mailing things out all three of those years or handing things out.

BY MR. VASALY:

Q. Now, with the understanding that you believe or there is a possibility that the Exhibit 3 is not complete, [27] so we're only focusing on a one-page document –

MR. MOHRMAN: Did you say there is a possibility that it is incomplete or that it is incomplete?

THE WITNESS: Assuming this is a photocopy of what I sent out, it is incomplete. There is a second page that's missing.

BY MR. VASALY:

Q. Well, let me rephrase that. Understanding your testimony that Exhibit 3 is not complete, focusing only on the one page that's before us of Exhibit 3, what was your intent in addressing the three decisions that are alluded to on Exhibit 3?

A. Well, my intent was to encourage people to vote for Greg Wersal.

Q. Was it your intent to indicate that you had a negative opinion of the three decisions that are referred to on Exhibit 3?

MR. MOHRMAN: You're asking him whether he said that or whether it was his intent, because I think the decisions are just quotes from the cases, Counsel?

BY MR. VASALY:

Q. Mr. Wersal?

A. I'm sorry, what was the question again, Mr. Vasaly?

(Whereupon the requested portion of the record [28] was read by the Court Reporter.)

A. To be quite honest, I think the answer to that is no, because what I tried again to do is set out the cases and the facts and people are going to decide for themselves after they read them whether they agree or disagree with either the decision or the way in which it was arrived at.

BY MR. VASALY:

Q. Turning to Exhibit 4, Mr. Wersal, can you identify Exhibit 4?

A. Yes. Again, it appears to be a photocopy of a piece of literature which was prepared for my campaign.

Q. In what year?

A. I knew you were going to ask that. As I sit here again today, I'm not sure without checking what records I've got and seeing if it would help me determine exactly when.

Q. Did you approve Exhibit 4 before it was made public?

MR. MOHRMAN: If you recall and if you recall whether it was made public or not. Object to the question, assumes facts not in evidence.

A. To be honest with you, I'm not sure whether this piece was sent out.

MR. MOHRMAN: The piece has bate stamp numbers at the bottom of it which assumes that these [29] materials would have been submitted in the Court by the Republican Party or us.

MR. LEVINGER: I can tell you where it came from. It's Tab X in the separate appendix of the Appellant's appeal to the Eighth Circuit.

MR. KAARDAL: And I think I can add that it was attached to your affidavit.

MR. MOHRMAN: Yes, and that's meaningless as to whether or not that went out. If you can recall whether it went out as you're testifying. If they want to show you your affidavit or where it comes from in the Court opinion, they can do that, too.

A. To be real honest with you, I can't remember when or if this piece was sent out. It may have been, it may not have been.

BY MR. VASALY:

Q. Can you recall whether at any time you approved Exhibit 4?

MR. MOHRMAN: Well, objection, Counsel. What do you mean by approve? And the reason I ask you that, Counsel, is I'm assuming that if Mr. Wersal had testified that this document Exhibit 4 went out from his campaign, then it's a legitimate question to ask him, but he just testified he doesn't know whether or not this document went out from his campaign or not, to the facts in evidence right [30] now is he doesn't remember whether this went out, so what do you mean by approve? Do you see what I'm getting at, Greg?

THE WITNESS: Yes.

BY MR. VASALY:

Q. Mr. Wersal, are you able to answer the question?

A. Again, without – you need to understand that –

MR. MOHRMAN: Do you understand, he's asking whether you approved this.

TH WITNESS: I don't think I can answer that.

BY MR. VASALY:

Q. Fine.

A. If I knew for a fact that we had sent it.

MR. MOHRMAN: Wait a minute.

THE WITNESS: But I don't.

MR. MOHRMAN: Well, let him know why. I think it's again what do you mean by approve?

A. Well, that's what I was trying to get at. If, in fact, we sent it out, then I probably approved it, but my

concern right now is I can't remember – I remember this piece being generated, okay? I don't remember that we sent it out. In other words, as I explained to you earlier, we would go through sometimes two, three, five, ten drafts of a [31] flier and to be honest with you, I'm not certain this one was sent out.

BY MR. VASALY:

Q. Mr. Wersal, have you or did you become more circumspect in what you felt free to state in your 1998 campaign as opposed to your 1996 campaign?

MR. MOHRMAN: As a result of Canon 5, Counsel? Again, object, vagueness.

MR. KAARDAL: Same objection.

A. I think the answer to that is yes because at one time the Lawyers Board of Professional Responsibility in a decision indicated to me that using their prosecutorial discretion, they were not going to prosecute me on ethical grounds based on the announce clause. There were two problems with that. The first is that that was their prosecutorial discretion and it was my fear they could change that discretion at any time and then suddenly I would be subject to a complaint.

The second was that the original complaint was never appealed so one of my fears was that I could face an appeal. An appeal could eventually end up in front of the Minnesota Supreme Court and when the Minnesota Supreme Court made the decision they made to change the rules on January 1 of 1998, it became very obvious to me that they were hostile or that I was – to candidates' First Amendment rights and [32] that I had to be far more

circumspect in what I said or didn't say in 1998 as opposed to what I think I did in 1996 or even '97.

BY MR. VASALY:

Q. So it's your belief that a person who complains to the Lawyers Board could appeal the dismissal ultimately to the Minnesota Supreme Court?

MR. MOHRMAN: Could you read that back.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MOHRMAN: Mischaracterizes his testimony. Go ahead and answer it, if you can.

A. Well, it's my understanding they don't issue a dismissal, they issue a determination that – what's the word – a determination that discipline is not warranted which can then be appealed to a Board member. That Board member's decision can then be appealed and eventually you can end up in front of the Minnesota Supreme Court.

BY MR. VASALY:

Q. Now, did the Lawyers Board ever give you any information that a party could appeal such a determination to the Minnesota Supreme Court?

MR. MOHRMAN: If you recall.

A. Did the Lawyers Board, is that what you're asking me?

[33] BY MR. VASALY:

Q. Correct.

MR. MOHRMAN: If you recall. My understanding is they issued a letter to you that Mr. Vasaly should have in his possession or his client does, so unless you recall everything that letter says, I would be careful about how you testify.

A. Well, it's not my understanding of what they say or didn't say but the understanding of what the ethics process is.

BY MR. VASALY:

Q. And what is your understanding based on?

A. What is it based on? Discussions with lawyers who practice in the area of lawyer ethics.

Q. So you were given information by lawyers who practice in the area of lawyers ethics that a person who files a complaint with the Lawyers Board would have a right of appeal of a determination that discipline is not warranted to the Minnesota Supreme Court?

A. No, I never said that.

Q. Please clarify.

A. I said they have a right to appeal to a panel member, that's spelled out right in the determination that discipline isn't warranted. The question then becomes whether depending on which way the panel member rules, [34] whether you will have a full hearing and then there is the possibility of an appeal beyond that to the Minnesota Supreme Court.

Q. And your belief that there is a possibility of an appeal beyond that to the Minnesota Supreme Court is based upon discussions you've had with lawyers who practice in the area of lawyers ethics; is that correct?

A. Yes.

Q. Is it based upon anything else?

A. Yes.

Q. What else?

A. My experience.

Q. Could you be more specific?

A. I had an ethics case that went to the Minnesota Supreme Court previously.

Q. What case was that?

A. You mean the title of the case?

Q. Okay.

A. I can't remember.

Q. Can you remember anything at all about it?

A. Yes.

Q. What can you remember about it?

A. Mr. Vasaly, here is the problem I've got, ethical complaints by your Board are supposed to be confidential matters, your Board cannot make them into [35] public matters. You're questioning me about these it seems to me is a violation of your Board's own rules and I don't think it's relevant except to say that it happened and that

I had the experience. If a judge tells me I have to lay out for you a confidential matter, I will do it, but beyond that, I'm not going to answer that question.

Q. I respect that, Mr. Wersal, and I don't want to pursue the inquiry further if it makes you feel uncomfortable. It's not a case of me having information that I was trying to get you to disclose publicly, I did not know. Now, do you feel comfortable in discussing simply the procedure of that matter without discussing the substance of it, and specifically the procedure of whether there was an appeal to the Minnesota Supreme Court?

MR. MOHRMAN: Don't answer that question. What's the relevance of this, Tom? Mr. Vasaly, would you please explain the relevance of this line of questioning and if you do not, I'm going to start instructing him not to answer. You have an obligation as an attorney before we take up discovery issues with Judge Davis to try to resolve them here. I am asking you what the relevance of this is. You're starting to get into personal matters regarding confidential issues with the Ethics Board and I don't see any relevance to that at all, and if you're doing this to embarrass my client or anything like that, I've got real [36] problems with it. So I'm going to ask you again, Counsel, will you tell me the relevance of this in order that I may have the opportunity to decide in conjunction with my client whether he should answer these questions or not?

MR. VASALY: I think I'll just let the question stand.

MR. MOHRMAN: So you're refusing my request to conduct a discovery conference on this issue?

MR. VASALY: I don't want to discuss a discovery conference right now.

MR. MOHRMAN: Then I'm instructing him not to answer the questions.

MR. KAARDAL: I have the same objection.

BY MR. VASALY:

Q. Now, Mr. Wersal, prior to the complaint that was filed against you in – was it 1996, do I have the date right?

A. There was a complaint filed against me in 1996, yes.

Q. Prior to your receipt of the determination of the resolution of the 1996 complaint, did you have a concern about the applicability of Canon 5 to your campaign practices?

A. Absolutely.

Q. You were aware of Canon 5 before you received [37] the 1996 Lawyers Board determination?

A. Absolutely.

Q. And were you concerned about the possibility that a complaint would be filed against you based on Canon 5?

A. Absolutely.

Q. And after receiving the determination from the Lawyers Board in 1996, did you become more concerned or less concerned about the possibility that you could be disciplined for a violation of Canon 5?

A. More concerned.

Q. Why did you become more concerned?

A. Because of the two items I just explained which were that it's a statement of prosecutorial discretion and my fear that that could be changed without notice to me and that I could then be prosecuted. And the second was that that decision was not appealed and I had been – I was afraid that an appeal could occur and I had been trying desperately through consultations with other lawyers, et cetera, to try to construct my speech that I gave, my activities, the literature that was handed out to comport with Canon 5 and yet I was having ethical complaints raised which meant that other complaints would most likely occur and then the question is how much do you want to risk your license and how much money do you want to spend defending [38] it?

Q. Before you received the determination in 1996 from the Lawyers Board, did you understand that a dissatisfied complainant could appeal to the Lawyers Board?

MR. MOHRMAN: Don't answer that. Counsel, could you explain what the relevance of this line of questioning is?

MR. VASALY: I'm sorry, Mr. Mohrman, I don't want to take the time doing it. I guess I'm concerned about the amount of time that's being taken and if you want to instruct your client to answer or advise your client however you want, but I don't want to get into me explaining the relevance.

MR. MOHRMAN: Counsel, I've only asked you to do that once before. I want to be clear. I think you

asked that question at least twice before and it's been answered previously and you seem to keep harping on this topic. Counsel, if you're going to force a response to this, that means we're going to have to go through a Rule 7.1 motion before the Court which will take a tremendous amount of time and effort and scheduling of discovery and the like, and actually before we can even submit that motion to the Court, we have to conduct a discovery conference and I'm not going to have Judge Davis rule on that and the most expeditious way to do that is to have it right now, so what [39] I'm asking you is tell me the relevance of this line of questioning so I can advise Mr. Wersal, yeah. I think you need to answer because here is how it bears in the lawsuit, but for some reason you're just refusing to do that and I can't understand that at all.

MR. VASALY: Well, the reason I gave is the reason that I have.

MR. MOHRMAN: And the reason is what?

MR. VASALY: The amount of time.

MR. MOHRMAN: Well, it would take you about 15 seconds.

MR. VASALY: It won't be the first or the last I'm worried.

MR. MOHRMAN: I only instructed him to not answer a question and we've been in this deposition for an hour and 15 minutes. And I don't know why you got into some sensitive Ethics Board matter which raised a whole host of issues here at the deposition and I'm not

sure whether my client should be answering those questions or whether he can and I want to know the relevance and you refuse.

MR. VASALY: You don't understand the relevance of his concern that a complaint would be filed against him and that that in turn, according to him, affected his 1996 campaign?

MR. MOHRMAN: Counsel, I don't think I've [40] objected to those questions because that's certainly one of the arguments we're making in this case. What I have objected to is all these questions regarding procedures and Supreme Court and references to other issues with the Ethics Board.

MR. VASALY: Well, it's now 2:20 and I prefer to – I have a meeting at 5:00 p.m. and I do not want to have to adjourn the deposition to another day. If we have to, we'll have to, but . . .

MR. MOHRMAN: We're not going to adjourn to another day, I can tell you that right now.

MR. VASALY: So I would like to get one response to the last question I asked and I'm not sure if the Court Reporter can find it, but if she can, I would ask her to repeat it and let's just get an answer on the record and move on.

MR. MOHRMAN: Why don't I just leave then. Counsel, I asked you to tell me what the relevance of the question was and I instructed my client not to answer and I'm sure you would love it if we can move on, but that's not my real purpose here today.

MR. VASALY: So you're instructing him not to answer?

MR. MOHRMAN: Well, I'm wondering what the relevance is because we're getting far afield.

[41] MR. VASALY: I decline to go into what my –

MR. MOHRMAN: You're refusing to conduct a discovery conference with me under the rules.

MR. VASALY: I already stated my position.

MR. MOHRMAN: We could get a federal rule book and take a look at what the rules require.

MR. VASALY: At this point there is a question on the table.

MR. MOHRMAN: I doubt he remembers it.

MR. KAARDAL: Can we take a short break, I have a necessity.

(At this time a brief recess was taken.)

MR. MOHRMAN: Back on the record. Based on our discussions off the record, Mr. Vasalay, and discussions that I had with my client, you can go ahead and ask Mr. Wersal his understanding of the ethics process.

MR. VASALY: Okay.

BY MR. VASALY:

Q. Mr. Wersal, did your understanding of the ethics process change as a result of your receipt of the Lawyers Board determination in 1996?

A. My understanding of the process, no.

Q. Prior to your receipt of the 1996 [42] determination, you understood that a complainant could appeal a determination that discipline is not warranted to a member of the Lawyers Board, correct?

A. Yes.

Q. And you had the same understanding afterwards?

A. Yes.

Q. Is there anything about that subject, complainant appeal rights, that changed or was affected in your mind after getting the 1996 Lawyers Board determination?

A. Again, I think there are several things that changed. The first is I had people stand up at conventions and say that they were going to file ethical complaints against me after that decision for conducting the same conduct that the Board or that in their prosecutorial discussion said they weren't going to do anything with or perhaps the complainant would say something else yet. The Minnesota Supreme Court started changing the rules on the – that took effect January 1st of '98. Those changes, the fact that I have people out there complaining tells me that I have to be very circumspect or I'm going to end up in a position where I don't want to be. I wanted to run for an office, I didn't want to create an ethics violation. I was trying to do the best I could to run for a political office, a public office without crossing the line.

[43] MR. MOHRMAN: The line being the Canon 5?

THE WITNESS: The Canon 5.

BY MR. VASALY:

Q. Mr. Wersal, as we all know, there are various parts of Canon 5 and let's just focus on one part of it, the provision that prohibits a candidate from announcing his or her view on disputed legal or political issues.

MR. MOHRMAN: For purposes of the deposition, we'll just refer to that as the announce clause.

MR. VASALY: That's fine.

A. Okay, that would probably be preferable.

BY MR. VASALY:

Q. Now, what can the Lawyers Board do – what can it do – what could it do to make you comfortable that you would be free from prosecution for violating the announce clause?

A. I'm not sure everything their office could do or not do, but they could start that they're saying this is constitutional or unconstitutional and give candidates a – some kind of a bright line. I shouldn't have to be subject to the whims of somebody based off their prosecutorial discretion. You're talking to run for a public office and it seems to me that you can't have a candidate run for an office when they don't know what they are able to say or not say. We're depriving the public their First Amendment [44] rights in the election process because it's too vague, there is no bright line.

Q. Well, let's take my clients one at a time. You've sued the Director of the Lawyers Board and the Chair. What is it the Director should do in your view right now to make you feel comfortable or sufficiently free from

prosecution so you don't feel threatened by him; what is it that he has to do?

A. The last time –

MR. MOHRMAN: A, it's speculative, and B, if there is anything that can be done. I mean, essentially what Mr. Vasaly is asking you is if you put this more in a legislative context and with the legislature, he's asking you what a prosecutor could do to make you feel comfortable about a legislator's conduct and I don't know if there is an answer to that.

A. Well, let me put it to you this way: It is not to go into a Court appearance and say we aren't going to prosecute this right now until it's determined whether it's constitutional or unconstitutional. I can tell you that's not what I want. What they can do, I don't know entirely, I'm not entirely knowledgeable about what their powers are or are not, but I can tell you when they go into Court and tell a judge that they're not going to prosecute it right now until it's determined – I think I've just been told, [45] "Mr. Wersal, if you've stepped over the line in the past and this is appealed that it's constitutional, we're coming after you," I think that's the message that was sent to me.

BY MR. VASALY:

Q. At any time have you asked the Chair or the Director of the Lawyers Board to take any action with respect to the announce clause?

MR. MOHRMAN: Other than by filing this lawsuit, Counsel?

A. The answer to your question, one thing we did, yes, was file the lawsuit, but in addition we sent several

letters to the Director's office asking for advisory opinions.

BY MR. VASALY:

Q. And one of them – one of the subjects of your letter was the announce clause?

MR. MOHRMAN: If you recall, this isn't a history exam. He's got copies of those letters and if he doesn't have those letters here at the depo, don't get at what the content was.

A. Without looking at the actual letters, I would want to review the letters.

BY MR. VASALY:

Q. Now, in 1996 following the Lawyers Board determination, some people threatened to file ethics [46] complaints against you; is that correct?

A. Yes.

Q. At what point in time did you decide to become a candidate in 1998?

A. I'm not sure I understand the question.

MR. MOHRMAN: Let me object on the grounds of vagueness. Counsel, you need to define – there is a point in time where a judicial candidate has to officially file with the State to become a candidate and before that, you know, people can kind of run exploratory campaigns or go out there and say, "I'm thinking about running," so maybe you need to clarify the question.

MR. VASALY: And before that, they can decide that they're going to become a candidate.

BY MR. VASALY:

Q. And my question is: Do you recall when you decided to become a candidate?

MR. MOHRMAN: I'm going to object on the same grounds, define the word candidate. Make sure when you answer his question that you define it, and also explain, you know, where – what your decision-making process was prior to the time of you actually filing with the State.

A. I think that the code itself talks about what is or is not a candidate, Canon 5, and that, if I remember that definition, it occurs perhaps as soon as the person [47] says – announces to anyone their desire to run for the office and I did that probably sometime in January or February of 1997.

BY MR. VASALY:

Q. What happened, if anything, between the time that you determined to withdraw as a candidate in 1996 and your announcement that you were a candidate for the 1998 election to cause you to become less apprehensive about possible prosecution by the Lawyers Board?

A. I didn't feel I was violating Canon 5 or the rules or that my conduct or my speech or other things.

MR. MOHRMAN: Could you read the question back for a minute.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MOHRMAN: Mr. Wersal, one way that question can be read is that it assumes that you became

less apprehensive that you would be prosecuted by the Lawyers Board and the other possibilities that I thought was that you maybe said I don't care whether I'm prosecuted or you made a decision that you would file this lawsuit and challenge the constitutionality and I just want you to be aware that there is an assumption in that question that you actually became less apprehensive that you would be prosecuted and maybe you didn't become less apprehensive, [48] you just didn't care or were willing to put up a challenge or became smarter about the announce clause and all that stuff, so . . .

A. I will try to answer your question understanding what he's just said. I think what Mr. Mohrman has said is true, I don't think I was less apprehensive with regard to what the Board might do. The question is was I less – I was somewhat less apprehensive about whether a complaint would be filed because there was an educational process going on within the Republican Party where I was attending many gatherings about what judicial candidates could or could not do and whether or not what I was or was not doing was a violation, so that's one thing that occurred. There might have been others, but that's the one thing that comes to mind right now was that the educational process seemed to make it less likely that a complaint would be filed in the first place.

BY MR. VASALY:

Q. Did you also have the intention in 1997 of filing a lawsuit challenging Canon 5?

A. In 1997, no.

Q. After you announced in 1997 that you were again a candidate, did anything happen which made you more apprehensive about the threat of prosecution by the Lawyers Board?

[49] MR. MOHRMAN: Could you read that back.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MORHMAN: Through to today, Tom?

MR. VASALY: I'll leave it open ended.

MR. MOHRMAN: So, from 1997 to today if the Lawyers Board has made you more apprehensive about the –

MR. VASALY: Let's read that back again.

(Whereupon the requested portion of the record was read by the Court Reporter.)

A. Yes.

BY MR. VASALY:

Q. What was that?

A. I attended a congressional – excuse me, I'm not sure whether it was a congressional district convention or a State district convention and an individual stood up, objected to my presence at the convention, tried to prevent me from being allowed to speak, said that what I was doing was unethical. It seems to me that happened in March, April, May of 1997. And so it brought back home to me that the educational process was leaving something to be desired, that there were still people out there who

were very hostile to my mere attendance let alone speaking or what I had to say at these conventions and, of course, another thing that eventually occurred were the changes made by the Supreme [50] Court and they took up consideration of those changes I think in October or November, October.

I asked various judges to recuse these ideas and they would not, they seemed hostile to that idea.They came up with a rule that I thought absolutely infringed on First Amendment rights and freedom of association as well as free speech, and again, I think that indicated a hostility to me and that meant I had to be all the more careful.

Q. When the Supreme Court considered the rule amendments in late 1997, did it consider any proposals with respect to the announce clause?

MR. MOHRMAN: If you recall. Again, Greg, this isn't a history exam. Whatever they considered is in the public record.

A. I don't know what went through their minds. I do know if you look at the records of what happened in '94 and '95, that the Supreme Court had considered changes to the announce clause and had basically laid that on the table was kind of the impression I got and that they could take that issue up at any time.

BY MR. VASALY:

Q. In late 1997, you did not ask the Supreme Court to make any changes in the announce clause, did you?

A. No.

Q. And approximately February of 1998 you asked [51] the Director of the Office of Lawyers Professional Responsibility for an advisory opinion concerning Canon 5?

A. Again, I can't remember. I asked for several advisory opinions.

Q. Okay.

A. The exact date, I'm not sure.

Q. As you sit here today, can you recall anything that the Director said in response to your advisory opinions that made you feel threatened with prosecution with respect to the announce clause?

MR. MOHRMAN: The Director specifically, Counsel? Do you know who the director is?

THE WITNESS: I think at the time it was Cleary.

A. Look it, I asked for several advisory opinions. I'm not sure any of them, without looking at them, I'm not sure whether they dealt with the announce clause, they dealt with campaign activities. The most recent – one of them, for instance, dealt with my ability to go to a public place and/or my campaign committee and hand out literature at a college campus when we found out there was going to be a convention in one room on the college campus.. The Director refused to answer or provide me an advisory opinion which I understand they have a right to do, but it didn't clarify the situation and made me again [52] realize that if there is a question in their mind about whether I can even be in a public place,

then there is perhaps questions as to exactly what position they're going to take with regard to the announce clause.

You're trying to separate out the announce clause from everything else and I just want to tell you that when you're running a campaign, all these things are interplaying and when I'm told I can't go to – be, for instance, on a public sidewalk, you start to wonder how far are they going to enforce the other types of restrictions that are there, that are available to them if they want to push it.

BY MR. VASALY:

Q. Well, for example, do you wish to be able to identify yourself publicly as a Republican when you run for judicial office?

MR. MOHRMAN: Don't answer that for a minute.

MR. KAARDAL: I object because it calls for a hypothetical situation because we all know Greg is not currently a judicial candidate.

MR. MOHRMAN: Could you read the question back to me.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MOHRMAN: Okay. Go ahead and answer.

[53] A. I think candidates should be able to identify themselves if they wish.

BY MR. VASALY:

Q. And do you personally wish to do so should you run for a judicial office?

MR. MOHRMAN: Identify himself as a member of the Republican Party or identify himself as a member of any political party?

BY MR. VASALY:

Q. Are you able to answer?

A. I'm not sure that I would want to or wouldn't want to because you may want to do that for a whole variety of political reasons, understand? And – but I think it's a decision that the candidate should be able to make with whoever he's consulting with on how he's going to run his campaign.

Q. Do you intend to become a candidate for judicial office again?

MR. MOHRMAN: Again, it's not a history exam.

THE WITNESS: He's asking about the future.

MR. MOHRMAN: That's what I mean.

A. If I can have free speech rights and I can discuss my views on cases, if I could seek an endorsement of [54] a political party, if I can go out and talk to the groups of people I want to talk to and freely associate, I might consider it, but right now the rules that exist make it almost impossible for anyone to conduct one of these campaigns and win and there is no other purpose to

doing this if you're not going to have a chance at winning.

BY MR. VASALY:

Q. Do you wish to be able to personally solicit campaign contributions should you run for judicial office again?

MR. MOHRMAN: Let me again note an objection on the grounds of vagueness. You meant that he would personally solicit funds to be paid to him personally or that he would solicit for people to contribute to the campaign?

MR. VASALY: Either.

A. I think that a candidate, if a candidate wishes, should be able to solicit funds in ways that are now prohibited by Canon 5 or at least the Lawyers Board, what they have told me as to how they would enforce Canon 5 with regard to that issue. For instance, I've been told that if I stand in front of a crowd at a podium and there is a thousand people in front of me and I say as a candidate, "By the way, my campaign needs money," that that is a personal solicitation of funds, yet I fail to see how I have created [55] any undue influence on any of those thousand people. I've been told that as a candidate if I would send out a letter to people that is signed by me that says, "By the way, we need campaign funds," that that would violate Canon 5. And again, I fail to see how that creates a situation of any kind of undue influence.

I think that there is a desire to prevent influence with the judges and that can be accomplished by other means that are already in the canon, for instance, that the funds

actually go to a campaign committee who can not disclose to the candidate who gave the funds, but to prohibit the candidate from actually asking for money in any way, what you have done is you have made it virtually impossible for anyone to run these campaigns, especially when you're talking about campaigns on a state-wide basis. What you're finding is that the only way people can run for these is either they're the incumbant and have all the benefits of incumbancy and they privately fund them, and to be honest with you, I'm not sure I see any great benefit to having people purchase judgeships by being independently wealthy. I think the system has, as it is now, has corrupted the election process that our constitution in Minnesota provides for.

BY MR. VASALY:

Q. Do you wish to meet personally and privately [56] with potential contributors and tell them that you need money for your judicial campaign?

A. To be honest with you, I'm not sure whether I want to do that, but I'm not sure that candidates shouldn't be allowed to do that.

Q. Do you –

A. In other words, you're asking me to decide hypothetically as to how I would run a campaign were the rules open and I'm not sure hypothetically how I might run a campaign. I can only tell you what the rules do now which is they are drastic in their effort to prevent candidates from in any way asking for money.

Q. Do you wish to be able to announce to voters your opinions on cases presenting issues on abortion, welfare and crime?

A. Again, it's a hypothetical, I wasn't able to do that. I mean, if your question is should candidates be allowed to discuss cases so long as they do not – I mean, I think they should be able to discuss cases far more than they can under the rule. Some Courts say they can discuss cases as long as they do not commit themselves. Some Courts have said that's a fair constitutional restriction, but that reading is far more than what we're allowed to do now.

Q. Mr. Wersal, just to be clear, I'm not asking what the rules say what candidates can and cannot do. I'm [57] asking what you would want to do should you run for judicial office again, I'm asking you about you personally, and so I'm asking whether you would want to, for example, indicate that you would handle certain types of cases differently from the way the incumbants have handled them?

A. Again, I think I indicated to you earlier that if I had my preference, I would be trying to discuss process and the correct balance between the Court and the legislature and that I think we have a type of judicial activism in Minnesota and that by making the voters aware of the process, I think they can get a better understanding of what judges do, what types of decisions they are making and then would be able to make an intelligent choice at a voting booth.

Q. Would you wish to announce to voters that you are anti-crime?

MR. MOHRMAN: That's a pretty specific question, Mr. Wersal. I don't know if you want to phrase it that way, it's again a hypothetical. You don't currently have a campaign running.

A. I don't know of anyone who would get elected saying they were for crime, so let me put it to you this way: If I had been able to discuss cases more, I might have been able to show what types of cases my opponent had voted on and how they had voted and discuss the logic behind those [58] decisions, so I'm not sure that's a statement that I'm anti-crime so much as, again, that the people need to make some intelligent decisions about what their Courts are doing.

BY MR. VASALY

Q. If you were running for judicial office, would you wish to be able to publicly announce your position as to whether a woman had a right to an abortion?

MR. MOHRMAN: Can you read the question back.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. KAARDAL: I object on the grounds of vagueness, again, it's the process versus the end result. You could agree with the result but disagree with the process and that's the end of my objection.

MR. MOHRMAN: Same objection, and it's hypothetical. He's asking you in this specific question whether you would want to specifically announce that in your campaign and if you know right now what you'd do, tell him.

A. I would say no.

BY MR. VASALY:

Q. No, you wouldn't want to make such an announcement, or no, you don't know, I'm not sure?

A. No, I don't want to make that announcement.

Q. All right. Would you wish to make –

[59] MR. MOHRMAN: Are you done with your answer?

A. I would like to add something to clarify. There is a different question which is what candidates should be allowed to discuss and not discuss. I just simply told you if it was left to me, I don't want to discuss it.

BY MR. VASALY:

Q. So you personally don't wish to announce your views on these issues but you believe that candidates should have that right; is that your testimony?

MR. MOHRMAN: Well, that's a misstatement of testimony. You asked him if he would wish to announce his views on whether a woman has a right under the constitution to an abortion. You are now boot strapping all possible issues into the question.

MR. KAARDAL: On behalf of my clients, I make the same objection.

MR. MOHRMAN: Do you understand the distinction, Greg?

THE WITNESS: I think I got lost.

MR. MOHRMAN: Well, he asked you before if you would wish to announce your views on abortion and you said no, you probably wouldn't, and now he's asking you, "So, you're not wanting to announce your views on any of these issues," and that wasn't your answer.

[60] A. Mr. Vasaly, I'm sorry, to be very honest with you, I'm not sure what your question is at this point in time and if you could rephrase it, I'd certainly appreciate it.

BY MR. VASALY:

Q. Let's back up. First of all, do I understand you correctly that you personally don't intend to announce your views on abortion rights but you believe that candidates should have that right in the abstract; am I correct?

MR. MOHRMAN: If you can answer, Greg.

A. I believe candidates have First Amendment rights and should be able to discuss cases, whether it's about abortion, adoption or crime intelligently with voters who can then make an intelligent decision. I mean, the question becomes how much can they discuss and how much can't they discuss and if you want to draw a line somewhere, I'm saying if you want to draw a line, make it a bright line so everybody knows where it is, but where the line is now, in essence, these things can't be discussed, candidates cannot state any views and either views that don't commit themselves as to how they would decide a case and it just seems the line is drawn in the wrong place and what we've done is we've closed down free speech for candidates.

BY MR. VASALY:

[61] Q. Do you wish to be able yourself to state your position as far as abortion rights is concerned should you run for a judicial office?

MR. MOHRMAN: If you can answer. He's again asking you a hypothetical.

A. I want to be able to decide that when I run, that's what I want to be able to do. When I'm a candidate, I want to be able to decide what I want to say or not say and have a bright line somewhere if there is something I can't say so I don't have to worry about whether I'm going to have an ethical violation. The people deserve a bright line as well. Right now the bright line either doesn't exist or it's been moved so far to one side that we have closed down all discussions.

BY MR. VASALY:

Q. One of the Plaintiffs in this case is Michael Maxim?

A. Okay.

Q. Do you know Mr. Maxim?

A. I know who he is, yes.

Q. Could you describe your relationship with him?

A. I think I met Mr. Maxim in 1996 and if I remember right, at the time he was a Chair of the Eighth Congressional District or a Co-chair of the Eighth Congressional District Republican Party and I had probably a [62] couple phone calls with him in 1996. I'm just trying to remember if I – that's how I met the guy.

Q. Have you had any communications with Mr. Maxim since January 1, 1997?

A. January 1 of 1997? Anything is possible I suppose, but I don't remember any.

Q. And in 1996, did your discussions with Mr. Maxim include discussions concerning your candidacy for judicial office?

A. I'm sorry, what was that?

Q. When you talked to Mr. Maxim in 1996, did you talk about your campaign to become a judge?

A. Yeah, sure. And Mr. Vasaly, I can think of an instance I think in early '97 where I had some conversations with Mr. Maxim.

Q. Did the 1997 conversations also include references to your candidacy as a judge?

A. Yes.

Q. Did Mr. Maxim support your candidacy as a judge?

A. I think the answer to that is no. It depends on how you're going to define the word candidacy, but the answer I would give you is no.

Q. At any point did you request that Mr. Maxim take any action on your behalf with respect to your judicial [63] candidacy?

A. If he was a Chair or Co-chair back in '96, I probably could have very well asked him if I could speak at his convention. Other than that, none that I remember.

Q. So you never asked him to seek Republican endorsement on your behalf, correct?

MR. MOHRMAN: If you recall. And vague as to time.

A. That's what I was going to say.

MR. MOHRMAN: What time period are we talking about?

BY MR. VASALY:

Q. At any time.

A. I've never asked anybody – well, let me clarify this. I don't believe I've ever asked anyone to endorse me. Candidates are prohibited from seeking endorsements, but it is possible he received campaign letters from my campaign committee people that asked him to take that action.

Q. Do you have any reason to think that they might have?

MR. MOHRMAN: They might have what?

MR. KAARDAL: I'll object to vague, I don't know what year we're talking about.

BY MR. VASALY:

[64] Q. Well, what year are you talking about, Mr. Wersal, when you're saying that you don't know whether the campaign committee might have asked him – strike that. Do you have any knowledge or reason to believe that your campaign committee at any time asked Mr. Maxim to take any action on your behalf?

A. To be honest with you, specific literature or specific action directed to him, no.

Q. Do you have any reason to believe that your campaign committee at any point might have been attempting to seek the Republican endorsement on your behalf?

A. Yes.

Q. In 1998?

A. No.

Q. In 1996?

A. In 1996.

MR. VASALY: I have no further questions.

MR. LEVINGER: I have some.

CROSS-EXAMINATION

BY MR. LEVINGER:

Q. Could we look at – what exhibit do you have in front of you?

MR. MOHRMAN: He has all four of them.

BY MR. LEVINGER:

[65] Q. Let's look at Exhibit 4, Mr. Wersal.

A. Okay.

Q. I realize before when you testified you were not sure if this had ever been distributed. In this document it is intended to convey that you were critical of some of the

decisions of the Minnesota Supreme Court; is that correct?

A. Look it, I think the answer to that is actually no, and again, I will try to explain to you why and maybe we're parsing words or whatever and I'm trying not to do that, but as much as possible, I tried in my campaign to exercise my free speech while staying within what I understood to be the bounds of Canon 5, so we would put together a brochure, which is what this is, which would state what happened in a case and frequently what the dissent was. It was not necessarily intended to convey my opinion, in fact, I would argue strenuously it was not, it was meant to make people think about what their Courts are doing, whether they agree or disagree and whether they have some means to take action if they disagree either with the outcome or the process.

Q. You've talked about the process a number of times. What do you mean by that?

A. The process?

Q. Yes.

[66] A. Okay. I think that Courts have – are criticized frequently for being activists and what the criticism is is that they're assuming roles more appropriately handled by either the legislature or the executive branch.

Q. If you were not – did not feel constrained in the last election by Canon 5, would you have indicated to groups of voters that you disagreed with certain specific decisions of the Minnesota Supreme Court?

A. I'm not sure if I would have said I disagree with specific decisions. I am quite sure I would have been able

to say that I disagreed with the process by which those decisions were arrived at.

Q. Focusing on –

MR. MOHRMAN: Are you done with your answer, Greg, or not?

THE WITNESS: Yeah, I think I am.

BY MR. LEVINGER:

Q. I'm sorry, I did not mean to interrupt, I thought you were done, too. Focusing on the first decision, Doe versus Gomez, the first issue here, do you believe that you or another candidate should have the discretionary decision making in running a campaign to indicate that the candidate disagrees with the result in this decision?

MR. MOHRMAN: I want to talk to my [67] client. Can you state that again.

(Whereupon the requested portion of the record was read by the Court Reporter.)

(At this time a brief recess was taken.)

MR. MOHRMAN: Back on the record.

A. I think that – I think candidates have to be able to discuss these cases far more than we can under the current rule if voters are going to make an intelligent decision. Where you want to draw that line I think is a question – so that the canon is constitutional I think is something you're going to have to decide. I'm not here to tell you how to draft this stuff, I'm here to tell you that

what you've got has created an impossibility, it has eliminated free speech, it has abrogated people's election rights.

BY MR. LEVINGER:

Q. Are you –

A. And in a certain respect you're asking me to give a hypothetical as to what is the perfect world out there, what is it that would be for a candidate, what is this panacea we're trying to reach and I don't have an answer for that. I'm simply trying to tell you that what we have here and what we're dealing with is too restrictive and there are other legal minds out there who can hopefully sit down and come up with a rule that is constitutional and [68] provides candidates the maximum amount of free speech and to meet whatever compelling State interest, if any exists, but what we're dealing with here isn't, it doesn't make it.

Q. Do you think, in your opinion, there is any compelling State interest in a prohibition on candidates for judicial office saying anything about particular decisions that have been made by the Court they're running for?

MR. MOHRMAN: If you can answer that question, Mr. Wersal. I mean, Counsel, we're not here today to assist your client in drafting a constitutional code, we're here today because the code you've drafted is unconstitutional and we're suing on that and your question is essentially asking Mr. Wersal a hypothetical whether he thinks he should be able to say such and such if there was no code, would that be okay with him. We're not here to answer those questions here today. We don't know

because your client has put in a judicial code that has put my client at exposure of losing his legal license and we believe that code is unconstitutional.

BY MR. LEVINGER:

Q. Can you answer the question?

A. To be quite honest with you, I don't think I understood the question when it was asked.

Q. Let me try again. You indicated in response to your – or to a previous question that you think that the [69] code restricts too much your speech or other judicial candidates can have; is that correct?

A. Yes.

Q. You also said in response to a previous question that voters should have more information and candidates should be able to discuss more about specific decisions; is that correct?

A. Yes.

Q. If you had not been restricted in your last campaign by Canon 5, you would have discussed some of these cases in Exhibit 4 in more detail than is set forth here?

A. Yes.

Q. And in a number of these, or maybe all of these, is it correct that you think that they are examples of improper judicial activism?

MR. MOHRMAN: Well, take a look at them.

BY MR. LEVINGER:

Q. Let me add to that. It states, "Here are just a few examples of recent judicial activism"?

A. Uh-huh.

Q. So you regard these as being examples of judicial activism?

MR. MOHRMAN: Let's again be clear about this particular exhibit. Mr. Wersal was not sure –

BY MR. LEVINGER:

[70] Q. I'm not saying did you say that, I'm saying do you believe that the eight cases listed here are examples of judicial activism which is a process of the Supreme Court with which you disagree?

MR. KAARDAL: I object on the basis of vagueness on behalf of all my clients.

A. I think they are examples of cases where people could reasonably conclude there was judicial activism. Some people may disagree with that, others would not. And again, my – I'm not sure this piece was again ever sent out and if you compare it with the language of Exhibit 3, again, the purpose here was to set out facts and set out cases to be quite honest trying not to state my opinion and to leave it to the reader to decide for themselves based on what the Court has said or done and what other people have said or done about that case, usually a dissenting judge.

BY MR. LEVINGER:

Q. Leaving aside Canon 5 again, is it correct that you would like to give or would have liked in the last campaign to give your opinion about these cases?

A. I would have liked to have been able to talk about them a lot more than I was, specifically the criminal cases because I do a lot of criminal defense work and that's the area I was most familiar with. That was an area in which I thought there were numerous – several decisions [71] that Mr. Page participated in that I think would have caused question in the minds of voters.

Q. As a candidate against Mr. Page, Justice Page, if you had not been constrained by Canon 5, would you have stated with respect to certain decisions in which he voted that you disagreed with his vote?

MR. MOHRMAN: Read his question back.

(Whereupon the requested portion of the record was read by the Court Reporter)

BY MR. LEVINGER:

Q. The question is if there was no –

MR. MOHRMAN: If there was no Canon 5 out there, would you represent – well, also assumes that Justice Page could criticize you as well.

MR. KAARDAL: I object, it calls for a hypothetical and vagueness. As Mr. Wersal has already stated, he objects to the process, so the fact that this case would never have come up if the Courts had proper understanding of jurisdiction I think is very important. Additionally,

it seems to me that Mr. Wersal has repeated over and over that what he wants is judges to be mutual. Judicial activism is not being for neutrality and it doesn't state the case.

MR. VASALY: And I object to the objections. I think that there has been a tendency to go [72] over the line from simply stating the objection to preserve it to attempting to interpret the question or suggest possible answers and I do object to that.

MR. MOHRMAN: I apologize if you got that impression, Counsel, that has not been our intent. I think the questions have been very vague and I'm not going to let my client get into trouble here today and give responses that are – that would be untrue based upon interpretation of a question or would harm his case because I'm very confident that if we had a judge in the room, that the questions would be struck down on objection and the objection would be sustained and you would have to rephrase them in a tighter manner, it is not my attempt to coach the witness.

MR. KAARDAL: The objection to the objection came after my objection and my concern is that at the beginning of this deposition, the lawyer for the Lawyers Board and for the Office of Lawyers Professional Responsibility would not stipulate that he would not bring complaints of ethical violations based on his statements today. It seems to be very reasonable in the situation where one is giving sworn testimony that he should have a very precise understanding, specifically when it can be a basis of an ethical complaint.

MR. LEVINGER: This question and the [73] previous few I've asked have asked Mr. Wersal to assume that Canon 5 did not exist, so certainly nothing I'm asking him could remotely be used as something against him since he's not asked to admit anything that he has done or would do if Canon 5 existed.

BY MR. LEVINGER:

Q. Do you remember my question, Mr. Wersal?

MR. MOHRMAN: If you can remember it, Greg.

(Whereupon the requested portion of the record was read by the Court Reporter.)

A. If you assume that Canon 5 does not exist and then, therefore, assume I could have said anything I wanted to say short of a falsehood, let's say, then I may have said that I disagreed or I may not have said that I disagreed based on a political decision at that point in time.

BY MR. LEVINGER:

Q. Since you are or were running against Justice Page, obviously you disagreed with a number of things he did as a justice, correct? Let me ask another question, maybe I am assuming something.

A. Yeah.

Q. May I assume that you were running against Justice Page because you disagreed with some of the decisions he voted on as a justice rather than simply that [74] you yourself wanted to be on the Supreme Court?

A. Well, I think both of those factors played a role as well as probably many others.

Q. Okay.

A. And I don't know how I would balance them out.

Q. Again, if Canon 5 did not exist and you – let's take last year when you were running in a campaign, would you have liked to have had the option to respond to a question from a voter, let's say, on State versus Scales, if a voter had asked you, "How would you have voted on State versus Scales?" would you have liked to have the option to answer that question?

A. Just to be clear in my mind, your question is if I would say something –

MR. MOHAMAN: Have her read back the question.

(Whereupon the requested portion of the record was read by the Court Reporter)

MR. MOHRMAN: He was asking if a voter asked whether or not you would vote differently on State versus Scales. All he's asking you is whether you wanted the option if there was no Canon 5.

A. Okay, I understand. The Scales decision deals with what type of evidence we're going to allow into Minnesota Courts and it would seem to me that that is a [75] public issue that should be discussed publicly and that all the voters in Minnesota should have some say on what type of evidence we're going to allow into our Courts. It deals with an administration of justice and

perhaps – you're asking me a hypothetical where Canon 5 doesn't exist. Perhaps this would be an instance where as a candidate, yes, I believe this type of evidence should be allowed in our Courts and that the voters should be able to hear that and understand that and have a say on it at an election booth.

I want you to understand again, one of my great criticisms, if I was to criticize that case, would be to deal with the process, although I'm not sure I'm happy with the decision, but the process which the case if you read it is not decided on a constitutional basis, the Court specifically says we're not basing this on Minnesota constitutional law but they set up a policy for what type of evidence was going to be allowed and they do that without any input from prosecutors, without input from police, without input from members of the public who might have an interest, defense attorneys as to how – or Trial Court judges, none of these people have any input into the system as to what type of evidence we're going to allow in and it would seem to me that that is a case where people should be able to have input.

BY MR. LEVINGER:

[76] Q. As –

MR. MOHRMAN: Counsel, or Mr. Wersal, I don't think you responded to his question and I would – he didn't ask for a long, rambling explanation about what you thought about Scales, he asked you whether you thought you should have the option to discuss it with the voters and I'm not asking you to reanswer the question. I want you to answer his questions carefully and answer only his questions.

THE WITNESS: I thought I did.

BY MR. LEVINGER:

Q. And there is no question pending right now so you shouldn't be talking. As a judicial candidate or if you were a judicial candidate, assuming Canon 5 did not exist, would you like the option in talking to a voter of saying if you were on the Supreme Court, you would vote to overrule State versus Scales?

A. Again, you're assuming Canon 5 doesn't exist. I don't know what I would have – I don't know that I wanted to say that. I know that I wanted to say that I disagreed with the process, that I though all those various groups that I mentioned before should have input into the process and then I think a Court can make a reasonable decision, but without proper input, we don't know that we have a proper result.

[77] Q. Would you disagree that if a candidate for some other office, say State legislator, were asked a question about whether he or she would vote to reverse some law, there is no ethical reasons why they could not say yes or no?

A. I'm not aware of what their ethics rules are.

Q. Do you feel that it is in some manner inappropriate for a candidate for a judicial office to say that he or she would vote to reverse State versus Scales or some other decision?

MR. MOHRMAN: Objection, vague, Counsel, and I'm going to instruct my client not to answer until you define what inappropriate is. We're dealing with the law and whether or not my client is violating the law,

we're not dealing with what my client's philosophy is if he was given the power to draft the Minnesota constitution.

MR. LEVINGER: Let me rephrase.

MR. MOHRMAN: If we were in the Soviet Union, people would think that's inappropriate. If you're in a completely –

MR. LEVINGER: I'm withdrawing it. Don't make a speech, I'll get on with it.

BY MR. LEVINGER:

Q. As a candidate for judicial office, again assuming Canon 5 did not exist, do you feel that you would like the option of telling a voter in response to a question [78] that yes, you would vote to reverse State versus Scales if the opportunity came up?

A. Okay –

MR. MOHRMAN: Well, I'm going to –

BY MR. LEVINGER:

Q. Let me rephrase it. Do you think it is important information for the voters to have from you as a candidate for judicial office, again assuming Canon 5 did not exist, if a voter were to ask you, "Will you vote to reverse State versus Scales if the opportunity arises?"

MR. MOHRMAN: Again, it's a hypothetical.

A. Yeah, again, it's a hypothetical. You're assuming Canon 5 doesn't exist. You're assuming it's a free wheeling, no holds barred, everything can be said, than I think

it's going to be a political decision as to whether you're going to or not. Some candidates will, some candidates won't.

MR. MOHRMAN: Do you have much more?

(At this time a brief recess was taken.)

BY MR. LEVINGER:

Q. Let me move on to another topic. You wanted to – according to your complaint, you wanted to engage in a variety of what I would call partisan – campaigning with partisan groups such as the Republican Party, correct?

A. Republican Party, the Reform Party, the [79] Democratic Party, there is about four or five other parties I can think of.

Q. You initially were saying that you actually made efforts previously to make appearances and seek endorsement from the Republican Party or your campaign committee made an effort to seek endorsements; is that correct?

A. That's correct.

Q. Are you familiar with the platform passed by the Republican Party at its convention in 1998?

A. I know they made some changes, I'm not completely familiar with it.

Q. Are you familiar with the previous years' platform, 1996 or 1994 or something?

A. No.

Q. Okay.

A. Not to any great degree, no.

Q. Are you familiar with what the platform says specifically about the abortion issue?

A. No.

Q. Are you aware in either 1998 or 1996 whether there were any votes taken at the State convention or resolutions adopted about abortion?

A. I have no idea.

Q. Would it be your understanding that most of the [80] people who would attend the Republican Party convention would disagree with the Doe versus Gomez decision?

MR. MOHRMAN: Objection, speculative.

A. I have no idea.

BY MR. LEVINGER:

Q. If you were appearing – again assuming that Canon 5 didn't exist, if you were appearing at a Republican convention and one of the delegates asked you something like, "do you agree to abide by the Pro Life platform of the Republican Party?" would you like to have the option of saying yes or no to that?

MR. MOHRMAN: Hold on. Could you read the question back.

(Whereupon the requested portion of the record was read by the Court Reporter)

MR. MOHRMAN: Again, objection, speculative, hypothetical.

MR. KAARDAL: Same objection.

MR. MOHRMAN: Answer it if you can, and again, he's just asking you if you want to have the option.

THE WITNESS: Well, again, he assumed Canon 5 didn't exist.

A. And then I think you're back to assuming that if Canon 5 doesn't exist, it's a political decision of what a candidate is going to say or not say.

[81] MR. MOHRMAN: I'm also going to note Mr. Wersal does not have the Republican Party platform in front of him. I mean, I think it would be – I would assume it's probably anti-abortion, but we don't know what the language is, but that's an assumption and I don't know what the platform is of the Republican Party on abortion.

BY MR. LEVINGER:

Q. Mr. Wersal, in an effort to gain endorsement by the Republican Party at the State level at some of its earlier conventions, assuming again that Canon 5 did not exist, would you have as a judicial candidate wanted to have the option of telling the candidates that you agreed with certain of the planks in the Republican Party platform?

MR. MOHRMAN: Objection, speculative, hypothetical.

A. Let me try to answer. First of all, I'm not sure what's in the Republican Party platform, but I want you to understand that if we assume Canon 5 doesn't exist, then aren't we making the assumption that candidates

can say whatever they want to say unless there is some other restriction such as that they can't state something false, and at that point in time it's going to be a political decision as to what you want to say or don't want to say and what answers you'll give or won't give to questions.

BY MR. LEVINGER:

[82] Q. You've labeled this as being, at least in your view, a political decision as to what answers to give assuming you weren't constrained by Canon 5. Would you feel constrained not to respond to questions about how you would vote in a case that was before the Supreme Court?

MR. MOHRMAN: Again, objection, speculative and vague. Constraint by what, Counsel?

A. Again –

MR. MOHRMAN: I want you to note my objection, he's not defining what constraining means.

BY MR. LEVINGER:

Q. Can you answer the question?

A. To be honest with you, it sounds like a make believe world. You're asking me to assume no rules exist and then asking me if I feel constrained and why would you feel constrained if no rules exist? If rules are appropriate, if people should be restrained, then let's create the rules, let's make them a bright line so people know what they can and can't say, so we know where our free speech is, so we don't have ethical complaints made that are meaningless, so people's licenses aren't in jeopardy, so candidates can say as much as they can so voters can get

as much information as they need so they can make an intelligent decision.

Q. Do you see your candidacy last year as being [83] any different vis-a-vis a political party such as the Republican Party as compared to a candidacy for any other State wide office – a non-judicial State wide office?

MR. MOHRMAN: Would you read that back.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MOHRMAN: Again, I hate to do it again, Mark, but I think the question is very vague. The number one end –

MR. LEVINGER: I'll start over.

MR. MOHRMAN: Question stricken?

MR. LEVINGER: Yes.

BY MR. LEVINGER:

Q. In terms of what you would like to do if you were not constrained by Canon 5 in terms of running the State wide judicial campaign, would you feel that you would like to have the option of doing anything of a political nature that other State wide candidates can do such as governor, attorney general, et cetera?

A. I'm sorry, I don't think I understood the question. I tried to listen as close as I could and I'm sorry, I don't think I understood it.

Q. Okay. You want to do certain things of a partisan nature in relation to appearing before political parties,

seeking their endorsement; I presume if you got an [84] endorsement, you would like the party to be able to publicize your candidacy; is that correct?

MR. MOHRMAN: Go ahead. Well, objection, it's hypothetical. I mean, your first two parts of your question because what Greg is challenging in this lawsuit is the abilities of him to seek the endorsement and also to appear in front of the Republican Party, telling the Republican Party what to do if they endorse their candidacy.

BY MR. LEVINGER:

Q. If the Republican Party had endorsed your candidacy, would it be your desire, assuming that Canon 5 didn't exist, that the Republican Party would use or you could use the Republican Party's endorsement to bolster your campaign?

MR. KAARDAL: I'm going to object on the vagueness, repeatedly on a lot of the questions, if Canon 5 doesn't exist. I'm confused because the subject of the lawsuit is only five portions of Canon 5 and I don't know if he's referring to those five sections or all of Canon 5.

MR. MOHRMAN: I don't have any objection, that's fine.

A. If Canon 5 does not exist, again, there is no prohibition on what candidates can or cannot do. It would seem logical to me that candidates that have been endorsed by any group would want to use that endorsement in some way [85] to say that hey, some group has thought that I'm a legitimate candidate and that that would be used to bolster your campaign.

BY MR. LEVINGER:

Q. And again assuming that the canons did not prohibit it in a judicial campaign as a candidate, would you also hope to have a political party that endorsed you to use that endorsement in its own literature or perhaps on its sample ballot?

MR. MOHRMAN: Could I have it again.

A. I can just answer it.

(Whereupon the requested portion of the record was read by the Court Reporter.)

MR. MOHRMAN: Let me clarify, it was not clear in the question, Mark. It's our understanding that there is absolutely nothing that's prohibiting the Republican Party of Minnesota from endorsing Mr. Wersal, the issue is whether Mr. Wersal or any other candidate can go before the party to seek the endorsements. The state of the law of a Political party, they have the First Amendment right to do that and publicize it to their judicial district.

MR. LEVINGER: Well, I'm asking him if a candidate –

MR. MOHRMAN: If he would like it if they [86] would go around the State trumpeting him? Can you answer that, Greg?

MR. LEVINGER: I thought it was a very easy question.

A. That's why I said let me just answer it. I think emphatically you want every and any and every group if

you're running for a political office to try to – if they support you, to get that information out to their members whether through a sample ballot or whatever means they want to use to talk to their members, but that's part of running for office and educating voters. Those – understand, those people aren't simply members of a political party, they are voters, and that's what's so disturbing about the way the rules are constructed is that other types of voters who don't belong to a political party get the information but it's being kept from certain groups of people.

MR. MOHRMAN: For instance, groups of lawyers can be solicited for their endorsement, not that they would have any interest in influencing judicial decisions.

MR. LEVINGER: I have no further questions.

MR. KAARDAL: I have no questions, but I would like to ask Mark, where do you want your brief served? Do you office here?

[87] MR. VASALY: I have a couple more questions.

(At this time a discussion was held off the record.)

RECROSS-EXAMINATION

BY MR. VASALY:

Q. Mr. Wersal, is there a compelling State interest in the Judicial Board's regulation of judicial campaign speech?

MR. MOHRMAN: Objection, calls for a legal conclusion for Mr. Wersal.

A. I don't think it's an area of law it should be involved in at all. I think the answer is no, I think it's the legislature who is to control our elections and if the legislature would pass the law defining what candidates can or cannot do, that might be an appropriate forum.

BY MR. VASALY:

Q. Would the legislature have a compelling State interest in regulating the speech of judicial candidates?

MR. MOHRMAN: In this State? I want that clarified.

BY MR. VASALY:

Q. Okay, Minnesota?

A. I have no idea. That's for you to prove that [88] you have one.

Q. Does the State have a compelling State interest in regulating a judicial candidate's ability to solicit campaign funds?

A. I have no idea. That's again for you to try to convince a judge that there is such a thing, I have no idea.

Q. Does the State have a compelling State interest in regulating party identification and party endorsement of judicial candidates?

MR. MOHRMAN: Again, objection, calls for a legal conclusion from the witness. Mr. Wersal, if you think you can answer it right now going through – I mean, that's the heart of the legal issue in this lawsuit and we're preparing papers right now and are in consultation with you and if you're prepared –

A. We're arguing there is no compelling State interest, sir, that it doesn't exist.

MR. VASALY: No further questions.

MR. KAARDAL: I have no further questions.

MR. MOHRMAN: I have no further questions. We'll read and sign.

(At this time, 4:10 p.m., the deposition was concluded.)

[89] (UPON COMPLETION, forwarded this Original Reading and Signing Certificate to Attorney Thomas C. Vasaly, who already has the Sealed Original.)

GREGORY F. WERSAL

I, GREGORY F. WERSAL, do hereby certify that I have read the foregoing transcript of my Deposition and believe the same to be true and correct (or, except as follows, noting the page and the line number of the change or addition desired and the reason why):

Page	Line	Change or Addition	Reason

Dated this day of , 1999.

[90] STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

Be it known that I took the deposition of GREGORY F. WERSAL, on the 25th day of January, 1999, at Saint Paul, Minnesota;

That I was then and there a Notary Public in and for the County of Hennepin, State of Minnesota, and that by virtue thereof, I was duly authorized to administer an oath;

That the witness before testifying was by me first duly sworn to testify the whole truth and nothing but the truth relative to said cause;

That the testimony of said witness was recorded in Stenotype by myself and transcribed into typewriting under my direction, and that the deposition is a true record of the testimony given by the witness to the best of my ability;

That I am not related to any of the parties hereto nor interested in the outcome of the action;

That the reading and signing of the deposition by the witness was executed as evidenced by the preceding page;

That Notice of Filing was waived.

WITNESS MY HAND AND SEAL this day of , 1999.

Kerri L. Brodock
Court Reporter

DEPO. EXHIBIT 1

VOTE
WERSAL
SUPREME COURT

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE

Judicial Elections:
The *only* means to judicial accountability.

The Minnesota Supreme Court has issued decisions which are marked by their disregard for the Legislature and lack of common sense. Judges must be held accountable.

CRIME: The Minnesota Supreme Court ruled that a criminal defendant has a legal right to avoid the Sentencing Guidelines established by the Legislature and receive a more lenient sentence.

WELFARE: The Minnesota Supreme Court struck down a state law designed to prevent people from moving to Minnesota only to collect the higher welfare benefits paid in this state. The Legislature should set our spending policies, not the Court.

ABORTION: The Supreme Court ruled that a woman's right to privacy under the Minnesota Constitution means not only does she have a right to abortion, but that the State *must use public funds to pay for it*. The dissenting judge remarked the Court "abandons all vestige of neutrality" in its pro-abortion stance.

An Important Message From Greg Wersal

"We need: Judges who will not legislate from the bench.
Judges who will strictly construe the Constitution.

That's why I need your support."

YES, Greg, I will support your campaign for the Supreme Court.

[ ] I can work on your campaign.
[ ] I've enclosed a campaign contribution of $___
[ ] I know a group that would like to hear you speak.

CONTACT ME AT:

name **address** **phone** ( )

MAIL TO

Campaign for Justice
7841 Wayzata Blvd.
Suite 201
Minneapolis, MN 55426

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE
(612) 546-3513

DEPO. EXHIBIT 2

VOTE
WERSAL
SUPREME COURT

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE

Dear Fellow Minnesotan,

I would like to tell you why to vote for me. However On January 1, 1998, the Minnesota Supreme Court created new rules on how judicial candidates can conduct campaigns. So before I go any further, I must issue to you the following **WARNINGS:**

1) This Letter Is Not A Request For Money. The Supreme Court has ordered that judicial candidates can not personally solicit money, even by letter. Some argue that this makes it impossible for a candidate to raise the funds to effectively challenge an incumbent and protects the influence of lawyers who give much of the money to judicial campaigns. But others say that the Court has acted to prevent the corrupting influence of money on judicial candidates; and, as our judges are honorable individuals, we have no reasons to doubt their motives.

2) This Letter Is Not A Request For An Endorsement. The Court has ordered that judicial candidates or campaign committees may not seek the endorsement of a political party; and as you may or may not belong to a political party, I would not want you to misinterpret this letter. Some have argued that this rule change, which allows other groups to endorse, such as lawyers, was done with the purpose of protecting incumbent judges from the accountability owed to the citizens in free elections. But others say the Court has acted only to prevent

the corrupting influence of politics on judicial candidates; and, as our judges have shown in the past that their decisions are above politics, we have no reasons to doubt their motives.

3) This Letter Is Not A Statement Of My Opinion. The Court has ordered that judicial candidates may not announce their views on disputed legal or political issues. Some have argued that this defeats the very purpose of an election, which is to allow an informed electorate to make a choice between candidates. Others say the Court has acted only to prevent candidates from taking positions on issues which will make it impossible for them to be impartial when presented with these issues as judges; and, as our judges have shown themselves to be impartial in their decisions, what is to be gained by having judges announce their views to the voters?

Neither in this letter, nor in the attachment, have I stated my opinion; but I have tried to present facts and the arguments of others so you may decide for yourself what to believe. Please do not confuse my having presented an argument, or the inadequacy of my presentation in this limited space, with my belief in the argument. With these warnings, I encourage you to read the attachment, and to vote for Greg Wersal, though the Court will not allow me to give you one good reasons to do so.

Yours truly,

/s/ Greg Wersal
Greg Wersal

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE
(612) 546-3513

DEPO. EXHIBIT 3

VOTE
WERSAL
SUPREME COURT

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE

JUDICIAL ELECTIONS

The *only* means to judicial accountability.

Judges are often criticized for their decisions and should be as their decisions affect the legal rights of others. They should interpret, not write the law. Judges who make poor decisions should be held accountable.

Here are some recent decision of the Minnesota Supreme Court. After reading these decisions, we hope you will be ready to –

VOTE FOR GREG WERSAL

ABORTION

The Legislature had passed laws prohibiting the use of public funds to pay for abortions. In 1996, the Minnesota Supreme Court ruled that the State must use welfare funds to pay for abortions. This is directly contrary to the U.S. Supreme Court, which stated, "When an issue involves policy choices so sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for the resolution in a democracy is the legislature." In other words the court should defer to the Legislature. The dissenting judge remarked the Court "abandons all vestige of neutrality" in its pro-abortion stance. (Doe v. Gomez)

ADOPTION

In 1996, the Minnesota Supreme Court interpreted a statute effecting adoptions throughout the state. The statute stated that a natural father who failed to act within 90 days of a child's birth to state his intention to retain parental rights "shall lose parental rights". Because the Court found that language was not clear the Court held that the father's parental rights were not terminated. The dissenting judge stated, "The statutory language is neither ambiguous nor confusing." (In the matter of the Paternity of J.A.V. and Conrad Hisgun)

CRIME

The Minnesota Supreme Court

[Remainder Of Flyer Unreadable As
Entered In The Lower Court]

GREGORY WERSAL'S
CAMPAIGN FOR JUSTICE
(612) 546-3513

DEPO. EXHIBIT 4

JUDICIAL ACTIVISM IN MINNESOTA

Recent Minnesota Supreme Court Cases

The often condemned activism of judges in Federal courts has spread to our judges in state courts throughout the nation. In the last 6 months, the Hawaii Supreme

Court using the Hawaii Constitution ruled the state must recognize gay marriages.

Minnesota is no different. Our Minnesota Supreme Court also legislates from the bench. Here are just a few examples of recent judicial activism.

ABORTION

The Legislature had passed laws prohibiting the use of public funds to pay for abortions. In 1996, The Minnesota Supreme court ruled that the State must use welfare funds to pay for abortions. This is directly contrary to the U.S. Supreme Court, which stated, "When an issue involves policy choices so sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for the resolution in a democracy is the legislature." In other words, the Court should have deferred to the Legislature. The dissenting judge remarked the Court "abandons all vestige of neutrality" in its pro-abortion stance. (Doe v. Gomez)

ADOPTION

In 1996, a Minnesota Supreme court ruling interpreting a statute has placed in jeopardy adoptions throughout the state. The statute stated that a natural father who failed to act within 90 days of a child's birth to state his intention to retain parental rights "shall lose parental rights". Despite the clear language used by the Legislature, the Court held that the Father's parental rights were not terminated. (In a matter of the Paternity of J.A.V. and Conrad Hisgun)

CRIME

The Minnesota Court held that a motorist has a right to consult with an attorney before deciding whether to take a breath test for alcohol, striking down the procedure established by the Legislature. The dissenting judge argued the Court was legislating from the bench: "My role . . . as a judge of the Minnesota Supreme Court is not to decide whether the legislature's policy decision would have been my legislative choice." (State v. Barsnes)

CRIME

The Minnesota Supreme Court ruled that an in-custody confession must be tape recorded or it would not be allowed into evidence. What this means is that a criminal's confession to the police will not be used against him if the police did not tape record it. Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free? (State v. Scales)

CRIME

In 1996, the Minnesota Supreme Court ruled that a criminal defendant has the right to a sentence outside that provided for in law by the Minnesota Legislature. The Legislature recently recommended sentences more severe in an effort to get tough on crime. The Supreme Court's ruling will allow criminals to receive sentences more lenient than that provided for by the Legislature. (State v. Givens)

CRIME

The Legislature passed laws providing for more severe penalties for those who sold crack than those who sold powdered cocaine. The Minnesota Supreme Court struck down these penalties due to the disproportionate impact on blacks. This action is directly contrary to the opinion of the U.S. Supreme Court. The dissent noted that the law passed by the Legislature did not have a discriminatory purpose, but had a valid purpose in providing a more severe penalty for crack, which is a "more highly addictive drug than cocaine in the powder form" no matter whether it is sold or used by whites or blacks. (State v. Russell)

SEXUAL ABUSE

The State Legislature passed a law to give more time to victims of sexual abuse to bring forward legal actions. In 1996 the Minnesota Supreme Court interpreted this law in such a way as to possibly eliminate hundreds of pending or anticipated sexual abuse cases before they even go to trial. Ember Reichgott Jung, Assistant Majority Leader in the Minnesota Senate and author of the Statute of Limitations law, stated "The Court appears to have over-stepped its Constitutional authority in significantly rewriting the law . . . while the [Court] may not have agreed with the Legislature's approach, the Court does not have the authority to rewrite a statute that is clear on its face." (Blackowiak v. Kemp)

WELFARE

The Minnesota Supreme Court struck down, as a violation of the Constitutional right to travel, a state law that limited welfare benefits. The purpose of the law was to prevent people from moving to Minnesota only to collect the higher welfare benefits paid in this state. The Court should have deferred to the Legislature. It's the Legislature which should set our spending policies. (Mitchell v. Steffen)

[Illegible]

GREG WERSAL'S CAMPAIGN FOR JUSTICE
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(612) 546-3513

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(22)

Supreme Court, U.S.
FILED
JAN 24 2002

No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, et al.,

Petitioners,

v.

VERNA KELLY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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Petition For Certiorari Filed September 24, 2001
Certiorari Granted December 3, 2001

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January 17, 2002

Mark B. Levinger is Counsel for the following Respondent: Minnesota Board of Judicial Standards

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James Bopp, Jr., Thomas J. Marzen, and Richard E. Coleson are Counsel for the following Petitioners: Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-Amerian Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, and Michael Maxim.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, et al.,

Plaintiffs,

vs.

VERNA KELLY, in her official capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; CHARLES E. LUNDBERG, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and EDWARD J. CLEARY, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants.

Civ. No. 98-831 (MJD)

AFFIDAVIT OF ARNE H. CARLSON

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Arne H. Carlson, being first duly sworn, depose and say:

1. I am the Governor of the State of Minnesota. My term expires January 4, 1999. As Governor, I have made numerous appointments to unfilled judicial terms. I have appointed six justices to Supreme Court vacancies, eight

judges to Court of Appeals, vacancies, and 93 judges to District Court vacancies.

2. I am a Republican and support the election of Republicans to the legislative and executive branches of government. However, I do not believe that judicial selection should be conducted in a partisan manner.

3. Under the Minnesota system, candidates for judicial vacancies are processed by the Judicial Selection Commission. Minn. Stat. § 480B.01. There are a total of 49 members of the Commission. The Commission has nine at-large members, seven of whom are appointed by the Governor and two by the Supreme Court, and 40 district members, four from each of the ten state judicial districts. For each district, two members are appointed by the governor and two by the Supreme Court. When there is a judicial vacancy in a particular district, 13 members of the Commission convene: the nine at-large members plus the four members from that district. The Commission solicits applications, obtains input from the local community, interviews candidates, and submits the names of three to five nominees to the Governor.

4. During the application and selection process, judicial candidates are not asked to state their political affiliation. It is reasonable to state that I have appointed a significant number of Democrats, Republicans, Independents, and apolitical applicants to judicial positions. I believe that the judges who have been appointed through this process possess the qualifications the citizens of this State want in their judges: "integrity, maturity, health if

job related, judicial temperament, diligence, legal knowledge, ability and experience, and community service." Minn. Stat. § 480B.01, subd. 8.

5. I do not believe there is any other state that has a judicial selection and retention process that is more efficient, more fair, or produces better judges than Minnesota. When Sandy Keith retired as chief justice, his departure was regretted by citizens across our State and across party lines – as was the case when Douglas Amdahl left, and Robert Sheran before him. These people would not have made it through a partisan selection process. The judiciary in Minnesota is exceptionally qualified and has the respect of the citizens of Minnesota. Many of the judges I appointed, who were the best qualified candidates available, did not have the political contacts, financial backing, or personal inclination to engage in partisan campaigns. In a partisan process, we would lose candidates such as these. The selection of candidates is already limited due to salary. We should not erect additional barriers. In Minnesota, we should be trying to preserve the system we have.

6. As a result of my many years in the political arena, I believe I have a good understanding of how citizens think and feel. When citizens find themselves in court, they do not want to appear before judges who are pre-committed to particular positions. The judicial selection and retention process should not mirror the legislative process. Legislative candidates are expected to commit themselves to positions. But that is not what citizens expect from judges. For the public to read newspaper headlines that a political party has endorsed and will work to elect a particular candidate would greatly

harm the public's confidence in the independence of the judiciary.

/s/ Arne H. Carlson
ARNE H. CARLSON

Subscribed and sworn to before me this
30th day of December, 1998.

/s/ Thomas Vasaly
Notary Public
My commission expires: 1/31/2000

[SEAL] THOMAS C. VASALY
NOTARY PUBLIC – MINNESOTA
RAMSEY COUNTY
MY COMMISSION
EXPIRES JANUARY 31, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, et al.,

Plaintiffs,

vs.

CHARLES FLINN, JR., in his capacity as Chairperson of the Minnesota Board of Judicial Standards, or his successor, et al.,

Defendants.

Civ. No. 98-831 (MJD)

SUPPLEMENTAL AFFIDAVIT OF EDWARD J. CLEARY

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Edward J. Cleary, being first duly sworn, depose and say:

1. I am the Director of the Office of Lawyers Professional Responsibility and have been since July 1997.

2. I am responding to Mr. Wersal's recent claim that "if Mr. Wersal has an ethical complaint pending against him. OLPR could be holding it until the outcome of this case." 2/22/99 Wersal Mem. in Opp. to OLPR's Motion at 4; *see similarly* 2/22/99 RPM Mem. at 20 (referring to a "meritless complaint" that Plaintiffs claim was submitted to my office by an anonymous RPM member in 1998). As Mr. Wersal should know, there are no pending ethics complaints against him in my office, and we are not

"holding" any complaints against him. *See* Wersal Depo. at 4-8 (Defendants' Ex. 15). When my office receives a complaint, we initially determine whether the complaint should be summarily dismissed or investigated. The complainant and the respondent lawyer are simultaneously notified of this initial determination, usually within three weeks after we receive the complaint. The notification to the respondent lawyer includes a copy of the complaint. Complaints are not public information. See Rule 20, Minnesota Rules on Lawyers Professional Responsibility.

3. Following consultation with my attorney, I determined not to provide an advisory opinion to Mr. Wersal in response to his March 27, 1998, letter. The reason I did not provide an advisory opinion, as I stated in my March 31, 1998, response to Mr. Wersal (1/29/99 Wersal Dec., Ex. 13), was that Mr. Wersal's request concerned Canon 5, he had sued the Lawyers Board over the constitutionality of Canon 5, and the litigation was still pending. It is not mandatory for my office to issue an advisory opinion upon request of an attorney.

4. I am also responding to the February 15, 1999, declaration of Michael S. Paulsen. I am not aware of any involvement by Mr. Paulsen with the Minnesota Lawyers Professional Responsibility Board. Specifically, I am not aware that he has represented attorneys before the Lawyers Professional Responsibility Board, served as a member of the Lawyers Professional Responsibility Board, or participated on the Minnesota Bar Association Rules of Professional Conduct Committee.

5. I have reviewed the materials cited by Mr. Paulsen in paragraph 2 of his declaration. I have also

reviewed Mr. Mohrman's June 18, 1998, letter to Bill Cooper stating that Mr. Wersal was not seeking and would not accept endorsement (1/25/99 Cooper Dec., Ex. M), the newspaper articles containing similar statements (1/27/99 Currell Aff., Exs. 6 and 7), paragraph 12 of Mr. Wersal's January 27, 1999, declaration herein that he asked his supporters not to act on his behalf or seek endorsement for him, and Mr. Wersal's January 25, 1999, deposition. Based upon my review of these materials, Mr. Paulsen's statement that Mr. Wersal's supporters' actions exposed him to disciplinary action by my office (*see* Paulsen Dec., para. 4) is incorrect. Based upon the evidence presented, complaints concerning the matter would be dismissed.

6. Mr. Paulsen states that "the mere occurrence of advocacy of such nature on [a candidate's] behalf likely could give rise to a disciplinary action, even if he did take aggressive steps to try to dissuade persons from engaging in such conduct." Paulsen Dec., para. 5. This statement is wholly incorrect. A candidate is responsible under Canon 5 only if he or she "authorizes or knowingly permits" the supporter to act.

7. I am not aware that there has been any significant problem in Minnesota with judicial candidates seeking endorsement by special interest groups. The sole instance of which I am aware was the subject of an ethics complaint filed against a judicial candidate in 1994. In order to seek endorsement by a special interest group, the judicial candidate was required to sign a statement committing himself to certain positions of the group. As indicated in Kenneth L. Jorgensen's January 27, 1999,

affidavit herein, the complaint was dismissed due to concern over the constitutionality of the announce clause of Canon 5.

/s/ Edward J. Cleary
EDWARD J. CLEARY

Subscribed and sworn to before me this
4th day of March, 1999.

/s/ Joanne E. Daubenspeck
Notary Public

[SEAL] JOANNE E. DAUBENSPECK
NOTARY PUBLIC – MINNESOTA
RAMSEY COUNTY
My Comm. Expires Jan. 31, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, an associations; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, an association; REPUBLICAN SENIORS, an association, YOUNG REPUBLICAN LEAGUE OF MINNESOTA, a Minnesota nonprofit corporation, MINNESOTA COLLEGE REPUBLICANS, an association; GREGORY F. WERSAL, individually; CHERYL L. WERSAL, individually; MARK E. WERSAL, individually; CORWIN C. HULBERT, individually; CAMPAIGN FOR JUSTICE, an association; MINNESOTA AFRICAN AMERICAN REPUBLICAN COUNSEL, an association; MUSLIM REPUBLICANS, an association; MICHAEL MAXIM, individually; and KEVIN J. KOLOSKY, individually,

Plaintiffs,

vs.

Case No.
98-831(MJD)

DECLARATION OF MICHAEL C. DEMOSS

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; CHARLES E. LUNDBERG, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and EDWARD J. CLEARY, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants.

MICHAEL C. DEMOSS, states as follows:

1. I am an attorney licensed to practice law in Minnesota, co-founder of Hamline Law School, in St. Paul, Minnesota, and a former Dean and Professor of legal ethics at the Garza Law School in Edinburg, Texas.

2. In 1992, I ran for the office of Chief Justice of the State of Minnesota.

3. In the course of my campaign, I stated "the unborn child is a human being, has constitutional rights, and the State of Minnesota needs to protect those rights."

4. The *Minneapolis Star Tribune* newspaper reported my views in an article on August 26, 1992.

5. As a result, the Minnesota Board on Judicial Standards filed an ethical complaint against me with the Lawyers Professional Responsibility Board alleging I had violated the Code of Ethical Judicial conduct by announcing my views on disputed legal and political

issues. A copy of the Complaint which was directed to Thomas Vasaly of the Lawyers Professional Responsibility board is attached as Exhibit A and is incorporated herein by reference.

6. As a result of making statements I believed to be within my rights to free speech protected by the First Amendment, I was labeled as "unethical" by the largest newspaper in Minnesota. My campaign for the Minnesota Supreme Court was damaged by this adverse publicity.

7. I fought the ethical complaint arguing that the rule prohibiting judicial candidates from announcing their views on disputed legal and political issues violated the First Amendment and notion of free elections in which the voters are to make an informed decision on who shall serve them as judges.

8. On August 3, 1993, the Director of the Office of Lawyers Professional Responsibility issued a determination that discipline is not warranted. A copy of this determination and its supporting memorandum is attached as Exhibit B and is incorporated herein by reference. In the memorandum, the director notes that the constitutionality of similarly or identically worded provisions had been challenged successfully in other jurisdictions and that since 1990 the American Bar Association had recommended that the Canons be changed to be more narrow in the impact on free speech. The director concludes "As a matter of prosecutorial discretion, the director has determined not to seek discipline in this case." The Board on Judicial Standards, which had filed the ethical complaint against me, had a right to appeal the director's decision, but they did not appeal.

9. As a former candidate for a judicial office, I believe that the rule prohibiting candidates from announcing their views on disputed legal and political issues has a profound chilling effect on free speech. Almost anything can be considered a "legal or political" issue. The rule is so broad that a candidate can hardly know what may or may not be a violation of the rule. And because the potential consequence of putting one's license to practice law in jeopardy is so severe, the rule prohibits candidates from speech far beyond what might be necessary to protect the impartiality of a judicial candidate.

10. The impact of the rule on free speech continues to this day. Just because the director of the Office of Lawyers Professional Responsibility chooses not to pursue discipline against me as a matter of prosecutorial discretion, does not mean that they won't pursue discipline in some future case against myself or another attorney running for a judicial office. In addition, the next candidate for judicial office would have to face the possibility that the Board on Judicial Standards may appeal a future decision of the Office of Lawyers Professional Responsibility to not discipline a lawyer who announces his views on what the Board on Judicial Standards believes is a legal or political issue. As long as the Code of Judicial Conduct contains language prohibiting candidates from announcing their views on legal or political issues, attorneys will fear discipline to exercise their free speech.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: January 25, 1999

/s/ Michael C. DeMoss
MICHAEL C. DEMOSS

EXHIBIT A

MINNESOTA BOARD ON JUDICIAL STANDARDS

[Names And Addresses Omitted In Printing]

August 31, 1992

Thomas Vasaly
Lawyers Professional Responsibility Board
1st Floor
520 Lafayette Road
St. Paul, MN. 55155

Dear Mr. Vasaly:

On Friday, August 28, 1992, the Board on Judicial Standards reviewed the statements of Michael DeMoss as published in the August 26, 1992 Star Tribune. Ms. Halverson has confirmed the statements were based on a interview she had with Mr. DeMoss. As you know, Michael DeMoss is a candidate for Chief Justice of the Minnesota Supreme Court.

This Board does not have jurisdiction over a lawyer's conduct when a candidate for a judicial position and thus, is unable to initiate an investigation or impose discipline, if appropriate. The Board recognizes the Lawyers Professional Responsibility Board's authority, under Rule 8.2(b) of the Minnesota Rules of Professional Conduct, to address a complaint of lawyer conduct under these circumstances.

We request your Board to investigate Michael DeMoss' statements for a possible violation of Canon 7B(1)(c) or any other violations of the Code of Judicial Conduct.

Very truly yours,

/s/ DePaul Willette
DePaul Willette
Executive Secretary

DW:df

Star Tribune

Wednesday
August 26/1992
Read then recycle

High court candidate sparks ethical debate

DeMoss takes strong stand on abortion

92/CAMPAIGN

By Donna Halverson
Staff Writer

By running for the Minnesota Supreme Court as an avowed opponent of abortion, Minneapolis attorney Michael DeMoss is putting Minnesota's judicial election system to the test.

The question posed by DeMoss' candidacy is this: Is it proper for a lawyer to run for a judgeship espousing a position on any social or political issue?

Chief Justice. A.M. (Sandy) Keith, whom DeMoss is challenging, says the answer is no. He says DeMoss is violating the Code of Judicial Standards by speaking out on abortion.

It is an unusual issue in an unusual election campaign. State court judges are required to run for reelection every six years, but they rarely have opponents. Keith will square off against two in the Sept. 15 primary: DeMoss and Ross Phelps, an assistant public defender in Houston County.

While judicial campaigns are usually low-key affairs, DeMoss is taking a firm stand on one of the most emotional issues of the day. What's more, he's running for a spot on the state's highest court, which is likely to have to rule on the issue.

The state's Code of Judicial Conduct says a judicial candidate should not "announce his views on disputed legal or political issues." That canon traditionally has limited campaign rhetoric to suggestions for improving the court system.

Keith said judges need to keep open minds in order to decide cases based on the facts. "It's hard to know how you're going to decide an issue until you really have to deal with the facts and the law that exist at any given time," he said. If a judge has a firm position on an issue, "I'm not sure you could judge it fairly," he said.

DeMoss points to another section of the Judicial Code and says he's allowed to speak out "on behalf of measures to improve the law, the legal system, judicial administration, or the administration of justice."

Although abortion is not his only issue – he's interested in improving training for judges, for example – it's clearly a key area of the law where he would like to see changes. He calls Roe vs. Wade, the 1973 U.S. Supreme Court opinion that legalized abortion, "a horrible fraud."

"Our Constitution must protect the unborn child's life because that constitutional right to life is inalienable," he said. "We didn't make up this right to life. It was endowed upon us by our creator." . . . So if it's given by God, only God can take it away. We can't legislate it away. We can't take it away as judges. And therefore, the unborn child has constitutional rights to life and due process and equal protection under the law."

A member of Minnesota Lawyers for Life, DeMoss said he arrived at his strong position as a result of seeing aborted fetuses and talking to doctors as a medical malpractice lawyer.

"I wouldn't want to go to the point of deciding cases before I've even had them before me," he said. "I think that it would be wrong for me to say I've decided that in the case of Smith versus Jones that it's going to be decided this way. You have to get all those facts. I can only tell you that I believe that an unborn child has constitutional rights."

Len Biernat teaches professional responsibility as Hamlin University School of Law. He said DeMoss appears to be violating the Judicial Code in two respects. "I think he does announce his preconceived notion of how he would decide a case," he said. "I think also the language (of the code) is such that he should not be making comments on issues that are politically in controversy. (Abortion) is one

that is more a political controversy than a legal controversy."

It's also an issue that, as a result of U.S. Supreme Court opinions following Roe vs. Wade, is increasingly being left to the states.

Abortion is "a hot issue, and you know that the Supreme Court in this and many other states are going to have to face it directly," said Richard Oakes, who also teaches law at Hamline. "Minnesota may not be the first state to pass a law that results in a court challenge but I think we're going to be one of them. It's on the horizon."

Meanwhile, Ross Phelps, the third candidate in the race, is steering clear of the issue. Phelps says he wouldn't state his position on abortion if asked. "I think ethically we're prohibited from doing that," he said.

Kevin Johnson, an assistant Hennepin County attorney who's running for another seat on the Supreme Court, also believes it's a violation of lawyers' ethical rules for DeMoss to speak out on abortion as a judicial candidate. "I think somebody could, and maybe should, file a complaint against him with the lawyers' board for violating the rules of professional responsibility," he said.

But DeMoss, one of the founders of the Hamline law school, is adamant on his right to speak out. "There's a constitutional right to speech," he said. "I wouldn't like to think that when I run for judge, I would lose that, or that anyone would hide behind the (judicial code) to keep the truth from coming out."

Johnson said some lawyers believe their First Amendment rights are violated by restrictions on what they can

say, but he believes judges need freedom to decide cases without worrying about being criticized by future election opponents. "Otherwise, what you'd find is people running against some judge who took a controversial but correct legal position," he said.

EXHIBIT B

In the Matter of the Complaint of MINN. BOARD ON JUDICIAL STANDARDS Attn: DePaul Willette 2025 Centre Ponte Boulevard Suite 420 Mendota Heights, MN 55120 against MICHAEL, C. DEMOSS, an Attorney at Law of the State of Minnesota.	**DETERMINATION THAT DISCIPLINE IS NOT WARRANTED**

TO: Complainant and James P. Larkin, Attorney for the Respondent Named Above:

Based upon the entire file the Director of the Office of Lawyers Professional Responsibility hereby determines that discipline is not warranted pursuant to Rule 8(d)(1), Rules on Lawyers Professional Responsibility. The attached memorandum states the basis for this decision.

NOTICE OF COMPLAINANT'S RIGHT TO APPEAL

If the complainant is not satisfied with this decision, an appeal may be made by notifying the Director in a

letter postmarked no later than fourteen (14) days after the date of this notice. The letter of appeal should state the reason(s) why the complainant disagrees with the decision. An appealed decision will be reviewed by a designated Lawyers Professional Responsibility Board member, whose options are limited to (1) approving this decision; (2) requiring further investigation; or (3) if it appears that public discipline is warranted, directing that the case be submitted to a hearing panel. This determination will generally be based upon the information which is already contained in the file.

Dated: August 30, 1993.

/s/ Marcia A. Johnson
MARCIA A. JOHNSON
DIRECTOR OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY
520 Lafayette Road, Suite 100
St. Paul, MN 55155-4196
(612) 296-3952

MEMORANDUM

In 1992, while a candidate for the position of the chief justice of the Minnesota Supreme Court, respondent stated to the news media that *Roe v. Wade* is a "horrible fraud," that "[w]e can't take [the right to life] away as judges," and that "the unborn child has constitutional rights to life and due process and equal protection under the law." Respondent also stated: "I think that it would be wrong for me to say I've decided that in the case of *Smith v. Jones* that it's going to be decided this way. you have to

get all those facts." During the campaign, respondent stated his position on abortion to the news media on several occasions. At that time, respondent was aware of the provisions of the Judicial Code concerning campaign conduct.

Rule 8.2(b), Minnesota Rules of Professional Conduct, provides: "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct." Canon 7B(1)(c) of the Code of Judicial Conduct provides that a candidate for judicial office should not "announce his or her views on disputed legal or political issues. . . . "

It seems apparent that respondent violated Canon 7B(1)(c). However, the constitutionality of similarly or identically worded provisions has been challenged in other jurisdictions, in some cases successfully. *See e.g., Buckley v. Illinois Judicial Inquiry Board,* Nos. 92-3279, 92-3283, and 92-3291 (7th Cir. June 10, 1993). Since 1990, the American Bar Association has recommended that Canon 7B(1)(c) be worded more narrowly.

As a matter of prosecutorial discretion, the Director has determined not to seek discipline in this case. The Director has weighed factors such as the harm or lack of harm caused by respondent's conduct, the resources required to defend against a constitutional challenge to Canon 7B(1)(c), the probability that the canon ultimately will be upheld, the likelihood that prosecuting respondent would result in discipline, and if so, the discipline likely to be imposed. Upon consideration of these factors, the Director has determined that it would not be a good use of the

limited resources available to her Office to seek discipline in this particular case.

M.A.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, et al.,

Plaintiffs,

vs.

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor, et al.,

Defendants.

Civ. No. 98-831(MJD)

AFFIDAVIT OF A.M. (SANDY) KEITH

STATE OF MINNESOTA)
) ss.
COUNTY OF OLMSTED)

I, A.M. (Sandy) Keith, being first duly sworn, depose and say:

1. That I was duly admitted to the practice of law in Minnesota in 1956 and presently reside at 5225 Meadow Crossing Road Southwest, Rochester, Minnesota. Since returning to Minnesota in 1955, I have been deeply involved in the political process of this state. I was elected to the Minnesota Senate as a representative of Olmsted County in 1958 and served in that position through 1962. I was elected Lieutenant Governor of Minnesota in November of 1962 and served in that position through 1966. In 1966, I was endorsed by the Democratic Farmer Labor Party for Governor and

ran and was defeated in the Primary in September of 1966. Following my defeat and after serving out my term as Lieutenant Governor, I engaged in the full time private practice of law in Rochester, Minnesota until I was appointed to the Governor Rudy Perpich on February 1, 1989. In November of 1990, I ran without opposition and was elected as an Associate Justice of the Minnesota Supreme Court. I was appointed Chief Justice of the Minnesota Supreme Court on November 30, 1990 and ran and was elected to that office in November 1992. I had two opponents. I served as Chief Justice until I retired on January 29, 1998. I have since returned to the private practice of law at my former law firm.

2. When I ran for the State Legislature, Lieutenant Governor, and Governor of this state I sought the support of the Democratic Farmer Labor Party and many other special interest groups. I understood I was running for these offices to make changes to laws and policies. I supported a political campaign platform. I often had constituents ask me for specific help with specific problems that involved state government, and I would try to help. I was fully aware that constituents would be watching my votes, both in the legislature and as a spokesperson for the executive branch, and that my votes and views would effect their votes in the next election.

3. Upon taking the bench in February of 1989, I learned very quickly that my job was to apply the law impartially to everyone that came before this court whether that person was a Democrat or Republican, Catholic, Protestant, Jew or atheist; whether that person was pro life or pro choice, pro labor or anti labor, pro public schools or pro

parochial schools, etc. I had a duty to apply the facts of each case to existing law if the law met the state and federal constitutional requirements.

4. My experiences running for judicial office were fundamentally different from my experiences running for partisan political offices. Before taking the bench, I realized it was important to sever all political ties to the Democratic Farm Labor Party. There is no other way I could have performed my job on the Minnesota Supreme Court and still retain in the minds of the public that this institution was, in fact, fair, objective, and impartial.

5. Minnesota has a long history of non-partisan judicial elections [since 1912]. Most judicial appointees in Minnesota never held elected office before they were appointed. The prospect of facing a contested election, even under the present non-partisan system in Minnesota, is daunting to most judges. Minnesota has an excellent reputation for the independence and high caliber of its judges. If the system in Minnesota were changed to permit partisan campaign activities, I believe many qualified judges and potential judges would opt not to participate; and, those who did participate would be under pressure to say and do things that would appeal to financial contributors, members of political parties, and voters generally. As a result, the independence and quality of our judiciary, I believe, would be put at risk.

6. Permitting judicial candidates to personally solicit campaign contributions, seek political party endorsement, and engage in the other campaign activities presently prohibited by Canon 5 of the Minnesota Judicial Code would, in time, damage the public's confidence in the judiciary

and put pressure on judges to decide cases in ways that would impress the judge's supporters favorably.

7. I served on the Minnesota Supreme Court when the Court considered and approved amendments to Canon 5. However, in making this affidavit, I am not expressing the Court's views or my own consideration of any matters before me when I served on the Court, but rather I am expressing my own view at this time as a private citizen.

Dated January 29, 1999 /s/ A.M. Sandy Keith
A.M. (Sandy) Keith

Subscribed and sworn to before me this
29th day of January, 1999.

/s/ [Illegible]
Notary Public
My Commission Expires: [Illegible]

[SEAL] [Illegible]
Notary Public – Minnesota
MY COMMISSION EXPIRES [Illegible]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Republican Party of Minnesota, et al.,

Plaintiffs,

vs.

Charles A. Flinn, Jr. in his capacity as Chairperson of the Minnesota Board of Judicial Standards, et al.,

Defendants.

Court File No. 98-831 (MJD)

AFFIDAVIT OF MARK B. LEVINGER

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, MARK B. LEVINGER, being first duly sworn, hereby depose as follows:

1. Attached hereto as exhibits are true and correct copies of articles obtained from the Internet and other sources:

A. Exhibit 1 is *North Carolina Bar Association Position Paper – Selection v. Election* (1990);

B. Exhibit 2 is the pertinent portion of the Code of Conduct for Judicial Employees;

C. Exhibit 3 is the pertinent portion of the Code of Conduct for United States judges;

D. Exhibit 4 is the *North Carolina Bar Association Position Paper:* Appointment of Judges Protects Our Just System (1998);

E. Exhibit 5 is *The League of Women Voters of Pennsylvania Position Papers:* Where We Stand On Judicial Selection;

F. Exhibit 6 is *The Amarillo Globe-News:* Partisanship;

G. Exhibit 7 is *The Dallas Morning News:* "Judicial Reform" (Nov. 26, 1998);

2. Enclosed as Exhibit 8 is a list of 28 Minnesota Statutes which contain the phrase "knowingly permit."

3. Enclosed as Exhibit 9 is a list of two Minnesota Statutes that contain the phrase "knowingly permitted."

4. Enclosed as Exhibit 10 is a list of six Federal Statutes containing the phrase "knowingly permit."

FURTHER AFFIANT SAYETH NOT.

/s/ Mark B. Levinger
MARK B. LEVINGER

Subscribed and sworn to before me on
this 22 day of February, 1999.

/s/ Linda A. Ratay
NOTARY PUBLIC

[SEAL] LINDA A. RATAY
NOTARY PUBLIC – MINNESOTA
WASHINGTON COUNTY
MY COMMISSION EXPIRES JANUARY 31, 2000

EXHIBIT I

SELECTION vs. ELECTION

Position Paper: North Carolina Bar Association, 1990

The state of North Carolina is in the process of partisan judicial elections. The underlying premise of partisan elections is that different parties stand for different positions. This premise is valid for legislative and executive offices. Judicial offices are different. An essential characteristic of a good judge, indeed a requirement of the Judicial Code, is the ability to put aside personal preferences and handle matters impartially, based on the laws of this state and the facts of the particular case being heard.

As a strong two-party system continues to develop in this state, we face the spectacle of increasing political rhetoric in the elections of judges. This rhetoric demeans and distorts the public perception of and public confidence in the system of justice in the state by suggesting that cases are, and presumable should be, based upon a judge's person or political philosophy rather than the law and the facts of the particular case.

When judicial candidates raise money and when special interest groups contribute to their campaigns, the perception is that justice is for sale.

These perceptions represent a distortion of reality, and are demeaning to the judicial system of this state, to its judges, and to the legal profession.

The system of justice we enjoy is envied and emulated by others throughout the world because matters are decided based upon laws administered impartially, and facts found by juries or judges without regard to personal or political philosophy.

Members of the legal profession for the most part represent clients with varied interests and are concerned primarily with obtaining judges with the highest legal ability and discernment.

Thus, the North Carolina Bar Association has strongly advocated for a number of years and continues to advocate changing the process of choosing judges by partisan political elections, as now provided in the North Carolina Constitution. Despite the efforts of the Bar Association, the people of North Carolina have not been afforded the opportunity to vote on this issue in the form of a constitutional amendment. The Bar Association has therefore participated with other organizations to form the North Carolina Committee on Judicial Campaigns. This committee has, among other activities, published a voter information guide setting forth the qualifications and background of each of the judicial candidates.

The Bar Association urges the voting public to give primary consideration to the training, qualifications and experience of the candidates, rather than party affiliation. The Bar Association urges both political parties to utilize restraining in connection with the ongoing election of judges. Finally, the Bar Association urges the 1991 General Assembly to authorize a referendum proposing judicial selection reform.

APPOINTMENT OF JUDGES PROTECTS OUR JUSTICE SYSTEM

Position Paper: North Carolina Bar Association, 1998

The North Carolina Bar Association has long supported merit selection of judges and applauds the Commission for the Future of Justice and the Courts ("Medlin Commission") for its recommendations in this regard. The electoral system as it now exists with partisan elections threatens the stability, experience, dignity and impartiality of the bench.

- The public has no confidence in the fairness of decisions when judges raise large sums in campaign funds from lawyers and other interest groups.
- Fund raising gives the appearance that justice can be bought for a price.
- Many lawyers who would make excellent judges will not consider the office because of the political demands of an election.
- Justice should not be partisan issue. While a move to non-partisan elections would solve some problems, the true solution is appointment.
- Campaign rhetoric demeans the bench and erodes the public's respect for the courts.
- Election campaigns can cause judges to publicly take positions on issues which might come before them. How can a citizen appearing before such a judge believe he or she will get a fair trial on that issue?

- As the Medlin Commission survey showed, most voters do not even know judges are elected, much less the identity of the judicial candidates are on the ballot.
- Merit selection with a retention election by the voters ("yes" or "no" as to whether the judge should remain on the bench) ensures accountability to the public.
- Retention elections avoid the criticisms encountered by the federal system of nomination/confirmation with lifetime tenure. The judges must be retained every eight years by the voters.

We urge you to support merit selection of judges to protect the justice system.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLIC PARTY OF MINNESOTA, an association; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, an association; REPUBLICAN SENIORS, an association, YOUNG REPUBLICAN LEAGUE OF MINNESOTA, a Minnesota nonprofit corporation, MINNESOTA COLLEGE REPUBLICANS, an association; GREGORY F. WERSAL, individually; CHERYL L. WERSAL, individually; MARK E. WERSAL, individually; CORWIN C. HULBERT, individually; CAMPAIGN FOR JUSTICE, an association; MINNESOTA AFRICAN AMERICAN REPUBLICAN COUNCIL, an association; MUSLIM REPUBLICANS, an association; MICHAEL MAXIM, individually; and KEVIN J. KOLOSKY, individually,

Plaintiffs,

vs.

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; CHARLES E. LUNDBERG, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and EDWARD J. CLEARY, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants.

Case No. 98-831(MJD)

DECLARATION OF ERIC L. LIPMAN

ERIC L. LIPMAN, deposes and states as follows:

1. I am the Deputy Secretary of State of Minnesota.

2. Under the Constitution of the State of Minnesota, and many subsequent laws enacted by the Minnesota Legislature, the Office of the Secretary of State undertakes and administers many of the functions relating to elections. For example, the Secretary of State accepts petitions and affidavits of candidacy for elective offices, including judicial office, that are voted on by the residents of more than one Minnesota county. (*See* Minnesota Statutes, Section 204B.09, Subdivision 1). Further, the Secretary of State collects and maintains detailed information on the vote totals in elections conducted in the State of Minnesota. (*See* Minnesota Constitution, Article VII, Section 8).

3. I undertook a review of the election records of the Secretary of State's office before authoring this declaration. A numerical breakdown of the number of contested elections in comparison with the total number of elections for judicial positions for the elections held in 1994, 1996 and 1998 throughout the State of Minnesota is as follows:

Election Year	Total Number of Election Contests for District Court, Court of Appeals and the Minnesota Supreme Court	Number of Contested Elections	Number of Uncontested Elections
1994	67	7	60
1996	121	16	105
1998	90	11	79
Combination of Years	278	34	244

4. The election records for the last three (3) general elections in the State of Minnesota, held in the years 1994, 1996 and 1998, for the positions of judge of the District Court, Court of Appeals and the Minnesota Supreme Court, suggest that in the vast majority of those elections, the incumbent judge seeking re-election was not opposed for re-election.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ ERIC L. LIPMAN
ERIC L. LIPMAN

Executed on: January 26, 1999

Signed before me on 1/26/1999

(LOGO) JEFFREY SIGURDSON
NOTARY PUBLIC –
MINNESOTA
DAKOTA COUNTY
My Comm. Expires
Jan. 31, 2000

/s/ Jeffrey Sigurdson

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, an association; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, an association; REPUBLICAN SENIORS, an association, YOUNG REPUBLICAN LEAGUE OF MINNESOTA, a Minnesota nonprofit corporation, MINNESOTA COLLEGE REPUBLICANS, an association; GREGORY F. WERSAL, individually; CHERYL L. WERSAL, individually; MARK E. WERSAL, individually; CORWIN C. HULBERT, individually; CAMPAIGN FOR JUSTICE, an association; MINNESOTA AFRICAN AMERICAN REPUBLICAN COUNCIL, an association; MUSLIM REPUBLICANS, an association; MICHAEL MAXIM, individually; and KEVIN J. KOLOSKY, individually,

Plaintiffs,

vs.

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; CHARLES E. LUNDBERG, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and EDWARD J. CLEARY, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants.

Case No. 98-831(MJD)

DECLARATION OF JULIANNE ORTMAN

JULIANNE ORTMAN states as follows:

1. I am a registered voter in Minnesota and reside with my husband in Chanhassen, Minnesota. We are both licensed attorneys and practice law at our own law firm.

2. Both my husband and I are members of the Republican Party of Minnesota.

3. In 1998, I ran for judicial office in the First Judicial District, Carver County. I ran against an an incumbent judge, Phillip T. Kanning. A true and correct copy of a Shakopee Valley News article dated September 3, 1998 is attached hereto as Exhibit A and is incorporated herein by reference

4. From the beginning of my 1998 judicial campaign, Canon 5 affected how I campaigned. Specifically, I did not do the following campaign activities that I otherwise would have done:

   (i) personally attend and direct my campaign representatives, including my husband, Ray Ortman, and others, to attend political party gatherings on my behalf

   (ii) personally announce and direct my campaign representatives, including Ray Ortman and others, to announce some of my views on disputed legal and political issues

   (iii) personally identify and direct my campaign representatives, including Ray Ortman and others, to identify myself as a past member of the Republican Party of Minnesota

   (iv) personally seek, accept and use the endorsement of the Republican Party of Minnesota and direct my campaign representatives, including Ray Ortman and others, to seek, accept and use the

   endorsement of the Republican Party of Minnesota on my behalf

   (v) personally solicit campaign contributions for my campaign

5. Canon 5 was a major inconvenience for my 1998 campaign. It kept information about my campaign and me from the public.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: January ___, 1999

_____

JULIANNE ORTMAN

_____

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, et al.,

Plaintiffs,

vs.

CHARLES FLINN, JR., in his capacity as Chairperson of the Minnesota Board of Judicial Standards, or his successor, et al.,

Defendants.

Civ. No. 98-831 (MJD)

AFFIDAVIT OF CAROL M. SOLBERG

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Carol M. Solberg, being first duly sworn, depose and say:

1. I am Administrative Director of the Minnesota District Judges Association and custodian of the Association's records.

2. Attached hereto as Exhibit A is a true and correct copy of the minutes of the Association's June 20-22, 1950, meeting at which the Association adopted the Canons of Judicial Ethics of the American Bar Association.

/s/ Carol M. Solberg
Carol M. Solberg

Subscribed and sworn to before me this

3 day of March, 1999.

/s/ Debra A. Shearen
Notary Public

DEBRA A. SHEAREN
[SEAL] NOTARY PUBLIC
– MINNESOTA
WASHINGTON COUNTY
My Commission Expires
January 31, 2000

Exhibit A

MINUTES OF ANNUAL MEETING
MINNESOTA DISTRICT JUDGES ASSOCIATION
RADISSON HOTEL, MINNEAPOLIS
JUNE 20, 21, 22, 1950

The Annual Meeting of the Minnesota District Judges Association was held at the Radisson Hotel in Minneapolis, pursuant to call of the senior member of the Association, Judge Edward Freeman of Duluth, on June 20, 1950, at 10:00 o'clock A. M.

The meeting was called to order by the President, Judge Mark Nolan, and the minutes were taken by the Secretary, Judge Milton D. Mason.

Those present were as follows:

DISTRICT	JUDGES
1	Schultz, Hall
2	Dane, Losvinger, Stewart, Pearson,
3	Gates
4	Weeks, Carroll, LaBelle, Lyons, Knudson, Fossen Selover, Rogers, Anderson, Guilford, Larson,
5	Anderson
6	Mason

7	Ruegemer, Barron, Rogosheake, Wilson
8	Morarity
9	A. B. Gislason, Enersen, S. P. Gialason, Heinzen
10	Nelson
11	Johnson, Holm, Nolan, Kenny, Freeman
12	Rolloff, Baker
13	Flinn
14	Montague, Lundgren, Sylvestre
15	Fullerton, Forbes, Hadler
16	Selnes
17	– – –
18	Keyes
19	Gustafson

On motion, duly seconded and carried, reading of the minutes was dispensed with.

Judge Mason read the treasurer's report, as follows:

Received from Judge Lundgren	$ 370.71	
From Judge Pearson, Minneapolis First National Bank	91.10	
From Dues, State Association	43.50	505.31
Paid to Arnold Pearson, [Illegible]	[illegible]	
George [Illegible] Jenson, Duluth, stationary	24.76	
Edith Dahl, typing juror's manual	10.00	
Mark Nolan, manual and postage	68.70	
Milton D. Mason, postage	[illegible]	
Bank charges on checks	.90	117.62
Balance on hand		$ 388.19

On motion duly seconded and carried, the treasurer's report was approved and filed.

Judge Nolan made the president's annual report, mentioning the Juror's Manual Committee and the Rules Committee as perhaps two of the most important. Judge Fullerton presented the report of his Committee, explaining the work, the cooperation with the State Board of Parole. Judge Schultz suggested that the agents recommend parole, or recommend a sentence. Judge Knudson explained that the intermediate plan between probation and prison walls had passed the legislature, but finances had not been arranged for. Judge Gate also spoke on this matter. It was then moved, seconded and carried that Gordon S. Jasok, Chairman of the State Board of Parole, be invited to speak. Rev. Mr. Engstrom of the Board, also present, spoke briefly, as did Judge Pearson, Judge Freeman, and Judge Fullerton. It was moved, seconded and carried that the committee be continued.

Judge Weeks discussed the Youth Conservation Commission, and introduced Mr. Reed of the Commission, who spoke on his work. Considerable discussion, participated in by many of the judges present, followed, with the consensus of opinion being that the right of review of YCC action by District Court be made mandatory, rather than permissive. It was moved, seconded and carried that the report be accepted and the committee continued.

Judge Kenny, Chairman of the Divorce Law Committee, read the report of that Committee, followed by considerable discussion.

The rules committee suggested participation in the Forum of proposed rules for June 21, and it was then

moved, seconded and carried that a further discussion of rules be held in the afternoon.

JUNE 20, 1950, 2:00 P. M.

It was moved, seconded and carried that the Association approve the six months interlocutory decree in divorce.

It was then moved and seconded that the Association approve a change of the law that either party may obtain a divorce after two years of separate maintenance be repealed, or amended, so that only the prevailing party may obtain a divorce. The motion was lost.

It was moved, seconded and carried that the Association feels that a divorce should be obtained only in the county of residence.

It was moved, seconded and carried that a committee be appointed by the incoming president to clarify this matter.

Judge Guilford, for the committee of retired judges to assist in the work, suggested for the committee that the law be amended to show that such retired judges, acting as referee or otherwise, are not practicing law. On motion made, seconded and carried, the report was adopted.

Judge Nelson spoke briefly on the Judicial Salary Committee, and the matter was passed.

Judge Freeman discussed the matter of courtroom decorum, and suggested that each district take care of its own problems in that respect.

Judge Freeman then moved that the Canons of Judicial Ethics of the American Bar Association be adopted by the Association. This motion was seconded and carried unanimously.

For the discussion of rules, Judge Hadler was given the chair by President Nolan, and there was a thorough discussion of the proposed rules, based to a large extent on those now used in federal practice and in other surrounding states.

It was moved, seconded and carried, that no action be taken until after participation in the State Bar Association's Forum on Rules, to be held on Wednesday. President Nolan then took the chair, and adjournment was taken until the morning of June 22nd.

JUNE 22, 1950, 10:00 A. M.

Judge Lyons gave a report on the Adoption Committee, and it was moved, seconded and carried, that this Committee be continued for another year and his report accepted.

Judge Johnson reported on the work of the Juror's Manual Committee, stating that the joint committee of Judges and the State Bar had approved the draft as submitted to the members of the Association. Judge Hadler, vice-president, was given the chair during this discussion. It was moved, seconded and carried that the report be approved.

As to publication procedure, it was moved, seconded and carried, that the Committee have power to act as they deemed best.

Judge Hadler, Chairman of the Rules Committee, presided during an extended discussion of the rules. Action of the Association was as follows, by motions made, seconded and carried:

Rule 26: Discovery by deposition
(Disapproved unanimously)

Rule 33: Interrogatories
(Approved in principle, 1 dissenting vote)

Rule 34:
(Approved in principle, Moriarity recorded as opposed.)

Rule 36:
(Approved in principle, Moriarity recorded as opposed.)

Rule 16: Pre-trial conferences
(Unanimously approved in principle.)

Rule 14:01, 82.02 – Third party practice
(Approved in principle, some dissenting votes.)

Judge Nolan then appointed a Nominating Committee consisting of Judge Flinn, as Chairman, with Judge LaBelle, Judge Kenny, Judge Lundgren and Judge Heinzen, to report this afternoon.

It was then moved and seconded that the Association recommend the adopting of a law requiring plaintiff to be a resident of the county for venue. The motion failed.

Rule 82.02
(No consideration or action; moved, seconded and carried.)

JUNE 22, 1950, 2:00 P. M.

Rule 5:04
Suggested that advisory committee reconsider the wording of Paragraph 2 as to advisability of requiring all pleadings to be filed a reasonable time before the opening of the term. (Carried unanimously.)

Rule 63:
Add "with consent of any judge so assigned."
(Approved with this addition.)

Rule 51:
(Recommend rule embodied in Alternative No. 51.)

It was moved, seconded and carried that the Secretary communicate the action of the Association to the Advisory Committee.

Judge Nelson reported further on the Salary Committee, and it was moved, seconded and carried that a committee for this purpose be re-named, to meet in the early fall with the Judicial Salary Committee of the State Bar Association, and submit a bill to the legislature.

A discussion of lawyers who have a large number of cases throughout the state, and being unable to handle them by being in more than one place at a time, followed. It was moved, seconded and carried that this matter be referred to the incoming officers.

Judge Flinn then reported for the Nominating Committee that the following had been nominated:

President – J. J. Hadler
Vice-President – Paul S. Carroll
Secretary-Treasurer – Sidney P. Gislason
Board of Governors – Mark Nolan
Judicial Council – G. A. Rolloff,
Milton D. Mason

Judge Hadler asked the Secretary to place the motion that the Secretary cast a unanimous ballot for the nominees. The motion was carried unanimously, and the Secretary cast the unanimous ballot.

There being no further business, the meeting was adjourned.

MILTON D. MASON,
Secretary

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, an association; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, an association; REPUBLICAN SENIORS, an association, YOUNG REPUBLICAN LEAGUE OF MINNESOTA, a Minnesota nonprofit corporation, MINNESOTA COLLEGE REPUBLICANS, an association; GREGORY F. WERSAL, individually; CHERLYL L. WERSAL, individually; MARK E. WERSAL, individually; CORWIN C. HULBERT, individually; CAMPAIGN FOR JUSTICE, an association; MINNESOTA AFRICAN AMERICAN REPUBLICAN COUNCIL, an association; MUSLIM REPUBLICANS, an association; MICHAEL MAXIM, individually; and KEVIN J. KOLOSKY, individually,

Plaintiffs,

vs.

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; CHARLES E. LUNDBERG, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and EDWARD J. CLEARY, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants.

Case No. 98-831(MJD)

DECLARATION OF ANTHONY G. SUTTON

ANTHONY G. SUTTON states as follows:

1. Since the summer of 1997, I have served as the Executive Director of the Republican Party of Minnesota. Before serving as Executive Director, I had more than ten (10) years of experience working on state and federal political campaigns.

2. In 1998, Canon 5 of the Code of Judicial Conduct made activities on behalf of Greg Wersal by any member of the Republican Party of Minnesota, including myself, a possible ethical violation against Greg Wersal. Greg Wersal was obligated under Canon 5 to instruct members of the Republican Party of Minnesota, including myself, not to campaign for him. Under Canon 5, all members of the Republican Party of Minnesota had to avoid campaigning for judicial candidates. It was clear to all Republicans who considered the issue that their activities in support of Greg Wersal could result in an ethical complaint against Greg Wersal filed by his opponent Associate Justice Alan Page or someone else. Undoubtedly, any type of ethical complaint would have hurt Greg Wersal's 1998 campaign. The safest course was for members of the Republican Party of Minnesota not to participate in the 1998 judicial elections unless a court injunction against Canon 5 was obtained.

3. The Republican Party of Minnesota sponsors every election year a series of meetings over four months. The meetings start at the neighborhood level, then go to the state senate district or county level, then to the congressional district level and finally to the statewide level. At the precinct caucuses held on March 3, 1998, delegates were elected to go to the state senate district or county convention. At the state senate district conventions and county conventions generally held in April, 1998, the delegates in

attendance elected delegates to attend the congressional district conventions generally held in May, 1998 and the June 18-20, 1998 state convention. At each level, attendees consider and vote on policy platform issues. At all the conventions after precinct caucuses, endorsements for appropriate level offices are made. In 1998, I attended various precinct caucuses, state senate district and county conventions, congressional district conventions and the state convention.

4. At all of these 1998 Republican Party of Minnesota gatherings, members of the party communicate and receive information about candidates for public office. Members of the party use this political information in many ways: when making campaign contributions; when considering endorsements; when voting, etc. Delegates prefer to receive information firsthand from the candidate or the candidate's campaign. Delegates prefer this type of direct information, rather than secondhand information.

5. The Republican Party of Minnesota uses endorsements of political candidates to unite the party behind one candidate and to make an affirmative statement to the public that the party favors the endorsed candidate for the particular office. When an endorsing convention gathers to consider one of multiple candidates, the understanding is that after the endorsement, all members of the party will unite to help that candidate get elected. Party endorsement brings many benefits to the candidate and the candidate's campaign, including campaign contributions, resources, credibility and visibility. A party endorsement also serves to galvanize the members of the party toward electing the endorsed candidate. It is a custom of the Republican Party of Minnesota

not to lend any support to statewide candidates who are not endorsed.

6. At the various precinct caucuses, state senate district and county conventions, congressional district conventions and the state convention I attended in 1998, I did not see Greg Wersal or his campaign representatives at any of them. It is my understanding that Canon 5 prohibited Greg Wersal and his campaign representatives from attending these meetings. The members of the Republican Party of Minnesota were thereby deprived of information from Greg Wersal and his campaign representatives because of Canon 5.

7. The eight Republican Congressional District Conventions were held in late April and May of 1998. The location and dates of the eight congressional district conventions were as follows:

First Congressional District: May 1 and 2, Mayo Center, Rochester, Minnesota
Second Congressional District: May 1 and 2, Worthington High School, Worthington, Minnesota
Third Congressional District: May 16, Holiday Inn, St. Louis Park, Minnesota
Fourth Congressional District: May 2, St. Paul Technical Vocational Institute, St. Paul, Minnesota
Fifth Congressional District: April 25, Minneapolis, Minnesota
Sixth Congressional District: May 2, Lakeville Jr. High, Lakeville, Minnesota
Seventh Congressional District: May 8 and 9, Red River Inn, Moorhead, Minnesota
Eighth Congressional District: April 24 and 25, Kahler Hotel, Hibbing, Minnesota

8. I was responsible for delivering the Official Call to the 1998 Republican State Convention to all the state

convention delegates. The state convention convened at 6:00 p.m., June 18, 1998, at Target Center, Minneapolis, Minnesota. One of the four stated purposes of the state convention was to endorse judicial candidates for the Minnesota Supreme Court. A true and correct copy of the Official Call is attached hereto as Exhibit A and is incorporated herein by reference.

9. I was responsible for publishing and distributing the Official Program of the 1998 Republican State Convention. The agenda for the convention at page 11 indicates that the endorsement of judicial candidates was to occur on June 20, 1998. A true and correct copy of the Official Program is attached hereto as Exhibit B and is incorporated herein by reference.

10. After the state convention convened on June 18, 1998, there was a long debate over amending Rule 23 on endorsements to permit absent judicial candidates to be endorsed. State Deputy Chairman Moonyeen Bongaards moved an amendment which consisted of Rule 23m which stated the following:

> 23m. If a candidate is unavailable to fulfill the obligations of this Rule 23, a delegate or seated alternate may volunteer to fulfill the obligations of this Rule 23 on the absent candidate's behalf.

11. The supporters of the amendment distributed a flyer. A true and correct copy of the flyer is attached hereto as Exhibit C and is incorporated herein by reference.

12. The debate on Moonyeen Bongaard's motion to amend the proposed rules was audiotaped and transcribed. I have reviewed the transcript and attest to its accuracy. A true and correct copy of the transcript is attached hereto as Exhibit D and is incorporated herein by reference.

13. On June 20, 1998, I read the *Star Tribune* newspaper article about the state convention's pending consideration of endorsement of candidates for judicial office. The article said that Greg Wersal, to comply with the judicial rules, was not seeking endorsement of the state convention. The article also said that Greg Wersal, to comply with judicial rules, would have to repudiate the endorsement on Monday, June 22, 1998, if the state convention endorsed him on Saturday, June 20, 1998. A true and correct copy of the *Star Tribune* article is attached hereto as Exhibit E and is incorporated herein by reference. This article clearly hurt the prospects of those at the state convention who wished to endorse Greg Wersal.

14. On June 20, 1998, I heard Chairman Bill Cooper give a speech on endorsing judicial candidates before he left the state convention. Bill Cooper's speech was audiotaped and transcribed. I have reviewed the transcript and attest to its accuracy. A true and correct copy of the transcript is attached hereto as Exhibit F and is incorporated herein by reference.

15. During the time I was at the state convention, I never saw Greg Wersal or his campaign representatives there. It is my understanding that they did not attend because Canon 5 prohibited him from being there. I wish Greg Wersal and his campaign representatives had been there so the state convention delegates and I could have received information about Greg Wersal and his campaign.

16. Because rule 23m was adopted, delegates and seated alternates could submit the candidate nomination forms on behalf of Greg Wersal, rather than he doing it personally. Delegates and seated alternates submitted approximately 20 candidate nomination forms to the Convention Secretary on behalf of Greg Wersal. True and correct copies of the candidate

nomination forms submitted are attached hereto as Exhibit G and are incorporated herein by reference.

17. At the state convention, delegates in favor of endorsing judicial candidates and in favor of endorsing Greg Wersal distributed flyers prepared and paid for by Senate District 46 Delegate Corwin Hulbert. I saw and read these flyers at the state convention. True and correct copies of these flyers are attached hereto as Exhibit H and are incorporated herein by reference.

18. At the state convention, delegates opposed to endorsing judicial candidates and opposed to endorsing Greg Wersal distributed flyers prepared and paid for by George W. Soule (Alternate, Senate District 60) and Kathleen A. Meyerle (Delegate, Olmsted County). It is my understanding that at the time of the state convention, Kathleen Meyerle was the chair of State Judicial Election Commission. Recently, George Soule replaced Kathleen A. Meyerle as the chair of the State Judicial Election Commission. I saw and read this flyer at the state convention. True and correct copies of this flyer are attached hereto as Exhibit I and are incorporated herein by reference.

19. The debate at the state convention on the motion to consider the endorsement of judicial candidates was audiotaped and transcribed. I listened to the debate. I have reviewed the transcript and attest to its accuracy. A true and correct copy of the transcript is attached hereto as Exhibit J and is incorporated herein by reference.

20. The state convention's vote on considering the endorsement of judicial candidates was 344 to 390; the motion failed. If Greg Wersal or his campaign representatives had been allowed to be at the state convention, I am sure this motion would have

passed. As far as I know, it was the first time in the history of the party that the state convention refused to pass a motion to consider endorsement of a candidate for a statewide office. On June 21, 1998, I read a *Star Tribune* article reporting on the state convention's failed motion to consider endorsements of judicial candidates. A true and correct copy of this *Star Tribune* article relating to the vote is attached hereto as Exhibit K and is incorporated herein by reference.

21. After the state convention's vote on the consideration of endorsement of judicial candidates failed, the state convention took up the issue of adopting a platform. I was responsible for publishing and distributing the proposed platform for the delegates at the state convention. I reviewed the platform before and after it was printed. The proposed platform contained plank 6.4 supporting the reform of "allowing judicial candidates the right to campaign & seek party endorsement." A true and correct copy of the proposed platform is attached hereto as Exhibit L and is incorporated herein by reference.

22. The State Convention adopted plank 6.4 of the proposed platform without amendment. This vote shows, in my opinion, that the state convention would have endorsed Greg Wersal if Canon 5 has not existed.

23. There was a short debate on an additional plank related to judicial campaigning. The additional proposed plank was to allow judicial candidates the right to state their opinions on legal issues and past cases. I listened to the debate. The state convention adopted the additional proposed plank. The debate at the state convention on the motion to adopt this additional plank was audiotaped and transcribed. I

have reviewed the transcript and attest to its accuracy. A true and correct copy of the transcript is attached hereto as Exhibit M and is incorporated herein by reference.

24. After the state convention, the Republican Party of Minnesota – according to its custom of not supporting unendorsed statewide candidates – could do nothing for Greg Wersal. The idea of including him on the statewide sample ballot was considered and rejected by the Executive Committee because of the custom of only supporting endorsed candidates. Canon 5 has accomplished its objective of keeping the Republican Party of Minnesota out of the 1998 judicial elections.

25. In the 1998 judicial election campaign, the Republican Party of Minnesota and its members desired to communicate with Greg Wersal in the following ways:

- receive information from Greg Wersal about himself (e.g., name, law school and current employer) and his campaign at the following Republican Party of Minnesota events: March 3, 1998 precinct caucuses, the March and April 1998 state senate district and county conventions, the April and May 1998 congressional district conventions and the June 18 through June 20, 1998 state convention
- receive information from Greg Wersal about his views on disputed legal and political issues
- receive information from Greg Wersal about his past or current political party memberships
- receive information from Greg Wersal about him seeking, accepting and using the endorsement of the Republican Party of Minnesota

- receive information from Greg Wersal soliciting funds for his campaign

26. In the 1998 judicial election campaign, the Republican Party of Minnesota and its members desired to communicate with each other – without Greg Wersal present – in the following ways on behalf of Greg Wersal:

    - communicate and receive information about Greg Wersal (e.g., name, law school and current employer) and his campaign at the following Republican Party of Minnesota events: March 3, 1998 precinct caucuses, the March and April 1998 state senate district and county conventions, the April and May 1998 congressional district conventions and the June 18 through June 20, 1998 state convention
    - communicate and receive information about Greg Wersal and his views on disputed legal and political issues
    - communicate and receive information about Greg Wersal and his past or current political party memberships
    - communicate and receive information about Greg Wersal and him seeking, accepting, and using the endorsement of the Republican Party of Minnesota
    - communicate and receive personal solicitations for campaign contributions for Greg Wersal

27. In the 1998 judicial election campaign, the Republican Party of Minnesota desired to communicate with the public in the following ways on behalf of Greg Wersal:

    - communicate and receive information about Greg Wersal and other judicial candidates (e.g., name,

law school and current employer) in connection with the following Republican Party of Minnesota events: March 3, 1998 precinct caucuses, the March and April 1998 state senate district and county conventions, the April and May 1998 congressional district conventions and the June 18 through June 20, 1998 state convention

    - communicate and receive information about Greg Wersal and the other judicial candidates and their views on disputed legal and political issues
    - communicate and receive information about Greg Wersal and the other judicial candidates and their past or present political party memberships
    - communicate and receive information about Greg Wersal and the other judicial candidates and them seeking, accepting and using the endorsement of the Republican Party of Minnesota
    - communicate and receive solicitations for campaign contributions

    In 1998, Canon 5 prohibited the Republican Party of Minnesota from communicating and receiving these constitutionally-protected communications.

28. The subject of claim 1 of the Second Amended Complaint filed on or about September 2, 1998, is Canon 5's infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech advocating Greg Wersal at 1998 Republican Party caucuses, conventions and meetings. The following sections of Canon 5 are relevant to the infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech:

    - "[A] candidate for election to judicial office shall not . . . attend political gatherings" or "speak

to . . . political organization gatherings, on his or her own behalf." Code, Canon 5 A (1), B (1).

- "A candidate for judicial office . . . shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate; (b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon; (c) . . . shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon." Code, Canon 5 A (3).

In the 1998 judicial election campaign, these sections of Canon 5 stopped the Republican Party of Minnesota and its members from engaging in constitutionally-protected speech advocating Greg Wersal at Republican Party caucuses, conventions and meetings.

29. The subject of claim 2 of the Second Amended Complaint is Canon 5's infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech advocating Greg Wersal and his views on legal and political issues. The following sections of Canon 5 are relevant to the infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech.

    - "A candidate for judicial office . . . shall not . . . announce his or her views on disputed legal or political issues." Code, Canon 5 A (3).

    - "A candidate for judicial office . . . (a) . . . shall encourage family members to adhere to the same

standards of political conduct in support of the candidate as apply to the candidate; (b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon; (c) . . . shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon." Code, Canon 5 A (3).

In the 1998 judicial election campaign, these sections of Canon 5 stopped the Republican Party of Minnesota and its members from advocating Greg Wersal and his views on legal and political issues.

30. The subject of claim 3 of the Second Amended Complaint is Canon 5's infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech advocating Greg Wersal and his current or past membership in the Republican Party of Minnesota. The following sections of Canon 5 are relevant to the infringement of the Republican Party of Minnesota and its' members' constitutionally-protected speech:

    - "A candidate for election to judicial office shall not . . . identify themselves as members of a political organization, except as necessary to vote in an election." Code, Canon 5 A (1).

    - "A candidate for judicial office . . . (a) . . . shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate; (b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's

direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon; (c) . . . shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon." Code, Canon 5 A (3).

In the 1998 judicial election campaign, these sections of Canon 5 stopped the Republican Party of Minnesota and its members from advocating Greg Wersal and his current or past membership in the Republican Party of Minnesota.

31. The subject of claim 4 of the Second Amended Complaint is Canon 5's infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech supporting or endorsing Greg Wersal. The following sections of Canon 5 are relevant to the infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech:

- "A candidate for election to judicial office shall not . . . seek, accept or use endorsements from a political organization. A candidate may- . . . establish committees to conduct campaigns for the candidate . . . Such committees . . . shall not seek, accept or use political organization endorsements." Code, Canon 5 A (1), B (2).
- "A candidate for judicial office . . . (a) . . . shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate; (b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited

from doing under the Sections of this Canon; (c) . . . shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon." Code, Canon 5 A (3).

In the 1998 judicial election campaign, these sections of Canon 5 stopped the Republican Party of Minnesota and its members from supporting or endorsing Greg Wersal.

32. The subject of claim 5 of the Second Amended Complaint is Canon 5's infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech to cause or receive communications soliciting campaign contributions on behalf of Greg Wersal. The following sections of Canon 5 are relevant to the infringement of the Republican Party of Minnesota and its members' constitutionally-protected speech:

- "A judicial candidate shall not personally solicit . . . campaign contributions." Code, Canon 5 B (2).
- "A candidate for judicial office . . . (a) . . . shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate; (b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon; (c) . . . shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon." Code, Canon 5 A (3).

In the 1998 judicial election campaign, these sections of Canon 5 stopped the Republican Party of Minnesota and its members from causing or receiving communications soliciting campaign contributions on behalf of Greg Wersal.

33. The following people are members of the Republican Party of Minnesota: Lawrence Aeshlimann, Bonn Clayton, April Guerin, Corwin Hulbert, Ed Lethert, Michael Maxim, Anthony Sutton, Cheryl Wersal, Mark Wersal, Jeff O'Brien, Brian McClung, Larry Alexander, Jack Gausman, Jesse Singh and Khalid Kader.

34. Lastly, I think it is unfair that the only political organizations regulated by Canon 5 are political parties. Special interest groups like Minnesota Trial Lawyers Association, Mothers Against Drunk Driving and the Bar Associations are not regulated by Canon 5. These special interest groups and their members are very active in judicial campaigns. It also bothers me that since members of these groups can also be members of political parties that these people can use their special interest groups to advocate for the election of a judicial candidate, but not their political party. Canon 5 does not make sense to me.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: January ___, 1999

_____
ANTHONY G. SUTTON

_____

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

REPUBLICAN PARTY OF MINNESOTA, et al.,

Plaintiffs,

vs.

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor, et al.,

Defendants.

Civ. No. 98-831 (MJD)

AFFIDAVIT OF THOMAS C. VASALY

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Thomas C. Vasaly, being first duly sworn, depose and say as follows:

1. I am an Assistant Attorney General for the State of Minnesota and represent Defendants Charles Lundberg and Edward Cleary herein.

2. Attached hereto as Exhibit 13 are the cover page, pp. 13-18, and the top of p. 19 of the transcript of the portion of the November 1, 1998, *60 Minutes* episode entitled "Justice for Sale?" which our office received from CBS News.

3. Also attached is a copy of my January 26, 1999, request to CBS News for permission to reproduce the

transcript along with the handwritten approval of Ms. Heddy Gold of the CBS News, Business Affairs Department.

/s/ Thomas C. Vasaly
THOMAS C. VASALY

Subscribed and sworn to before me this

28th day of January, 1999.

/s/ C. O. Ransom
Notary Public
My commission expires: _____

[SEAL] C. O. RANSOM
NOTARY PUBLIC – MINNESOTA
My Comm. Exp. Jan. 31, 2000

[LOGO] CBS NEWS
524 West 57th Street, New York, N.Y. 10019

60 MINUTES

[Image Omitted In Printing]

VOTE EARLY, VOTE OFTEN – Produced by
Richard Greenberg, Mary Murphy
I'VE GOT A SECRET – Produced by John Tiffin
JUSTICE FOR SALE? – Produced by Tom Anderson
A FEW MINUTES WITH ANDY ROONEY

November 1, 1998

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Transcript produced by *Burrelle's Information Services*
Box 7 • Livingston, New Jersey 07039

(*Editorial cartoon shown of a clown behind a judge's bench, a scale on the bench which has a money bag weighing down one side, and a sign which reads, 'Texas Judicial System'*)

WALLACE: (*Voiceover*) After our report aired, some editorial cartoonists painted the court as a bunch of corrupt clowns.

(*Close-up of sign on building reading, 'Texas Medical Association'; footage of Kim Ross talking with Wallace*)

WALLACE: (*Voiceover*) And the Texas medical Association spread the word that the court, by approving fat malpractice awards, was putting some doctors out of business. So Kim Ross, the doctors' chief lobbyist, decided to retaliate.

So you said, 'We're going to get rid of this court.'

Mr. KIM ROSS: Yeah, yeah. We said, 'This isn't right. Something has to be done.'

(*Footage of several campaign ads that were run in Texas*)

WALLACE: (*Voiceover*) Kim Ross launched an all-out attack on the old court in 1988 and, joined by big business, he funded a group of candidates he called the clean slate. Some of those candidates even used our report in their commercials to paint the old court as corrupt and bad for Texas.

(*Excerpt from campaign ads that were run in Texas*)

WALLACE: (*From campaign ad*) Is justice for sale in Texas?

Announcer #1: (*From campaign ad*) (*Voiceover*) 60 MINUTES asked that question. Tom Phillips has said no to big money.

WALLACE: (*Voiceover*) Tom Phillips, the chief justice, told us that commercial helped him win the election.

(*Footage of Texas Supreme Court proceedings; Walt Borges walking through courthouse and sitting in court*)

WALLACE: (*Voiceover*) Four other judges on the so-called clean slate also won. But what is it they've cleaned up? Walt Borges has written about the court for 10 years, first as a reporter, now as a consumer advocate, and he says this new court has been influenced by big money just as much as the old court. He says it's just coming from a different source.

(*Footage of Wallace and Borges*)

WALLACE: Back in 1987, when we did the first piece here, where were the justices at that time getting their contributions from?

Mr. WALT BORGES: They were getting a lot of their contributions from the lawyers, the consumers' lawyers.

WALLACE: Plaintiffs' lawyers.

Mr. BORGES: Plaintiffs' lawyers.

WALLACE: Who won most cases?

Mr. BORGES: The studies that we – we did show that about 67 percent of the time, two-thirds of the time, the plaintiffs won the cases in 1987.

WALLACE: And today?

Mr. BORGES: Today, the defendant wins 69 percent of the time.

WALLACE: (*Voiceover*) By 'defendant,' Borges means the business and insurance companies who are being sued.

How do insurance companies fare before this court?

Mr. BORGES: The insurance companies win roughly 90 percent of the time.

WALLACE: What you're saying is it went 180 degrees the other way.

Mr. BORGES: The philosophy of the court has shifted. If there is a bias in 1985, there is now a bias the op – opposite direction in 1998.

(*Footage of the outside of a building; Texas Supreme Court justices leaving their bench; close-up of Payola Justice report; Craig McDonald sitting at desk and speaking on the phone*)

WALLACE: (*Voiceover*) Why? An outfit called Texans for Public Justice says the new court, unlike the court in 1987, receives most of its contributions from corporations and doctors, and their lawyers. Their recent report, called Payola Justice, has infuriated the court. But the group's director, Craig McDonald, insists it's right on the money.

(*Footage of Wallace and McDonald*)

Mr. CRAIG McDONALD: We took a look at the campaign finances of this court and found that the members of this Supreme Court, in their quest to raise $9 million for re-election, raised $4 million of that money from the

very lawyers and parties who had cases before the court during that period.

WALLACE: Are you suggesting that Supreme Court justices in Texas can still be bought?

Mr. McDONALD: This court seems to reward its highest donors.

(*Footage of Wallace and Borges*)

WALLACE: Are these men and women on the current court dishonest, unethical?

Mr. BORGES: As individuals, no. As a system, the system is corrupt, and it leads to corrupt results. A tremendous amount of – of business, medical money, was – was mobilized and used to elect a – a court that basically had a singular phil – philosophy, and that was very pro-business, pro-defense.

(*Footage of Judge Rose Spector on the campaign trail*)

WALLACE: (*Voiceover*) And out on the campaign trail last month, Supreme Court Judge Rose Spector is hearing from some Texas voters who are upset about the court's swing to the right.

Unidentified Woman: Our Supreme Court needs some Democrats there to vote against the corporations and the HMOs. We need you there.

WALLACE: (*Voiceover*) A judge for 24 years, Spector has to campaign as if she were running for town council.

Unidentified Man #1: As long as you're a Democrat, that's the main thing.

WALLACE: (*Voiceover*) She's a Democrat in a tight race, and she knows that her campaign is not about the law, it's about politics.

(*Footage of Judge Spector at a speaking engagement*)

Judge ROSE SPECTOR: It's great to be here, great to be among so many Democrats. Our Supreme Court race is close. I need your help.

(*Footage of John Hill; photograph of Texas Supreme Court justices at the time of Hill; Wallace and Hill*)

Former Judge JOHN HILL: It's Democrats vs. Republicans, which is ridiculous. There's no Republican justice or Democratic justice; there's just justice.

WALLACE: (*Voiceover*) John Hill was chief justice of the court back in the '80s.

You told me back in '87, you were resigning to reform the system.

Mr. HILL: Exactly.

WALLACE: And it hasn't been reformed up to now.

Mr. HILL: Well, it hasn't been perfectly reformed. We've put limitations on the amount of contributions.

WALLACE: How much?

Mr. HILL: Five thousand dollars per individual. That's not low enough to suit me, but that was the compromise.

(*Close-up of Senate bill; graphic on screen, 'Law firms, $30,000; political action committees, $300,000'; Wallace and Hill*)

WALLACE: (*Voiceover*) Under that compromise, however, law firms can still give $30,000, political action committees can give $300,000. And what is the price of a campaign these days for the Supreme Court?

Mr. HILL: It's still outrageous, and I think it's up to about $2 million on the average.

(*Footage of Texas Supreme Court proceedings; Wallace and Bud Shivers; graphic on screen, 'Texans for Lawsuit Reform, Working together for a fair, honest and balanced civil justice system'; Wallace and Bud Shivers*)

Unidentified Man #2: Thank you. Be seated.

WALLACE: (*Voiceover*) And even though they have to raise those millions of dollars, judges on the court insist they are honest and ethical. And not surprisingly, Bud Shivers agrees. His organization, Texans for Lawsuit Reform, has been a major donor to judges who are pro-business.

Mr. BUD SHIVERS: Today, less than 40 percent of the contributions come from lawyers.

WALLACE: And the 60 percent comes from?

Mr. SHIVERS: Ordinary individuals, businesspeople who have no interest before the court, don't anticipate ever having any interest before the court.

WALLACE: Mr. Shivers, 60 percent of the money from businesses, corporate interests, hospitals? It – it doesn't make sense that they have no interest before the court. They've got to have interest before the court.

Mr. SHIVERS: Business has an absolute interest in a fair and impartial mainstream court.

WALLACE: So this is kind of a disinterested, God-fearing business community. All they're interested in is fair justice.

Mr. SHIVERS: Well, I'm not going to speak to their religious beliefs, but I'll tell you why I contribute to members of the Supreme Court, and that's because I think a fair and impartial judiciary is a bedrock of civilized democracy.

(*Footage of Wallace walking with State Senator Rodney Ellis; Wallace and Shivers*)

WALLACE: (*Voiceover*) But State Senator Rodney Ellis says that's not the real reason people like Shivers and others contribute to judges' campaigns. Ellis is chairman of a Senate committee that oversees the court.

State Senator RODNEY ELLIS: Most people who give large amounts of money tend to be bottom-line oriented. You don't give campaign contributions just because it's a philanthropic endeavor. And I think those large amounts of money create a distrust on the part of the public. They create a perception that justice is for sale in this state.

(*Footage of Wallace and Hill*)

WALLACE: You say this is a first-rate court.

Mr. HILL: Yes, it is, I think, by – by what I look at it, and that is for traditional judges that go by the law that's written by the Legislature.

(*Footage of Wallace and McDonald*)

WALLACE: John Hill resigned as chief justice because he thought that the system was corrupt, joined a law

firm, and he thinks that the current court is doing a first-rate job.

Mr. McDONALD: Well, the court is doing a first-rage [sic] job for Mr. Hill's clients. We're not so sure it's doing a first-rate job for Texas.

WALLACE: All right. Prove to me that they're doing a first-rate job for Mr. Hill's clients.

Mr. McDONALD: Whenever there is a plaintiff involved – a victim, if you will, or a consumer up against an HMO, a toxic polluter, an insurance company, a hospital, 80 percent-20 percent, the hospital, the insurance company wins. Those are John Hill's clients. He is happy with the system as it is.

(Footage of outside of tall office building; secretary at desk; sign on door, 'Liddell, Sapp, Zivley, Hill & LaBoon, LLP'; Wallace and Hill)

WALLACE: *(Voiceover)* And being part of the system means that Hill's Houston law firm still contributes tens of thousands of dollars to Supreme Court candidates.

Mr. HILL: We give money to judges, and it's in varying amounts. I think that's part of our civic responsibility and our legal responsibility, and I feel it very deeply.

(Footage of Texas Supreme Court proceeding; Judge Nathan Hecht at bench)

WALLACE: *(Voiceover)* But Hill concedes it's demeaning that judges have to spend that money on TV commercials that have nothing whatsoever to do with the law. Example: Supreme Court Justice Nathan Hecht aired this one.
(Excerpt from Hecht campaign ad)

Announcer #2: *(From ad)* *(Voiceover)* He's just Nathan, a man never too busy to teach Sunday school, or to entertain the older people at his church.

(Footage of Wallace and Hill)

Mr. HILL: Why should they have to go out here and take their time away from their work and their duties to the people and grovel around with lawyers and others to raise enormous amount of money to seek that office, just to say, 'I want to stay'?

WALLACE: Do you disagree with the central finding of that Payola Justice report that many of the lawyers and law firms who've given money to the judges still have cases before the court?

Mr. HILL: Well, sure, they have cases before the court. You didn't need a research piece to establish that.

WALLACE: You remember the Havner case, of course.

Mr. HILL: I do, of course.

(Footage of Hill arguing before the court)

WALLACE: *(Voiceover)* Pharmaceutical case. You were defending a drug company. Just one week after arguing before the court, you yourself signed a letter to raise money for one of the judges, Judge Baker.

Mr. HILL: Well, the timing of that was – was lousy.

WALLACE: I have the letter here.

(Close-up of letter)

Mr. HILL: *(Voiceover)* Well, that's fine.

Judge Baker, when he realized that the case was under submission that I was in . . .

(*Close-up of John L. Hill's signature*)

Mr. HILL: (*Voiceover*) . . . and that I was a signatory to that – one of the signatories to that letter . . .

(*Footage of Judge Baker; Texas Supreme Court proceeding; camera pans Texas Supreme Court justices*)

WALLACE: (*Voiceover*) But Judge Baker did not remove himself from the case until the lawyer arguing against John Hill objected to his letter. And the fact is, judges in Texas rarely withdraw from cases just because one of the lawyers or corporations appearing before them has contributed to their campaigns. For years, John Hill has urged the governor to cleanup the system by appointing judges to a short term before they have to face the electorate.

(*Footage of Governor George Bush; Wallace and Ross*)

WALLACE: (*Voiceover*) But so far, Governor George Bush and the Legislature have refused to go along. Even lobbyist Kim Ross, who spent a lot of money to unseat the old court, agrees that something has to be done.

Mr. ROSS: As you know, this is an arms race.

WALLACE: When you say an arms race, the ammunition is money, both sides.

Mr. ROSS: It ought to be done differently, and there is not a member of that court that wouldn't tell you right now . . .

WALLACE: From the chief justice on down . . .

Mr. ROSS: On down, yeah.

WALLACE: . . . everybody says, 'Hey let's do it differently.'

Mr. ROSS: Yeah. In – in – including us.

(*Footage of Texas Supreme Court proceeding; Wallace and Ellis*)

Chief Justice TOM PHILLIPS: That concludes the argument in . . .

WALLACE: (*Voiceover*) But while the chief justice, Tom Phillips, calls for reform he also acknowledges he has raised more money in campaign contributions than any Supreme Court judge in Texas history. State Senator Rodney Ellis says that many judges talk reform down there, but the judges actually lobbied against legislation he sponsored to limit campaign contributions.

What happened?

St. Sen. ELLIS: Most people though the bill was going too far too fast, the limits were too low, so a good number of judges around the state were making calls to members of the Legislature, judges who were concerned about if the limits were too low, they wouldn't be able to raise enough money to get elected.

(*Footage of Hill at desk*)

WALLACE: (*Voiceover*) And former Chief Justice John Hill says it would be less about money, if only Texans themselves demanded it.

Mr. HILL: We haven't been able to get a coalition together, but we're making a lot of progress, Mike. You

helped get this started. I hope you'll help get us over the line. I really beg and implore the people of Texas to change this system. Pray for us it will be successful, because it'll be a great day for Texas.

WALLACE: Take politics, take money out.

Mr. HILL: Out, out, out!

(*Announcements*)

STATE OF MINNESOTA
Office of the Attorney General
[Name and Address Omitted In Printing]

January 26, 1999

Ms. Heddy Gold
CBS News
524 West 57th Street
New York, NY 10019

VIA FACSIMILE AND UNITED STATES MAIL

Dear Ms. Gold:

I request permission to reproduce a transcript of the "Justice for Sale?" portion of the November 1, 1998, *60 Minutes* program for the limited purpose of offering it as an exhibit in connection with my motion for summary judgment in the case of *Republican Party of Minnesota, et al., vs. Verna Kelly, et al.* In this case, the Republican Party is suing to enjoin enforcement of those provisions Canon 5 of the Minnesota Code of Judicial Conduct that prohibit judicial candidates from engaging in certain campaign activities. The Minnesota Attorney General represents the defendants, the Minnesota Board of Judicial Standards and the Minnesota Lawyers Professional Responsibility

Board. I believe the transcript I am asking to reproduce provides a good description of some of the problems that could arise if Minnesota's Canon 5 was declared to be unconstitutional.

Since the deadline for submission of my motion and supporting materials is January 28, 1999, I request your consideration of this request at your earliest convenience. Thank you very much for your consideration of this matter.

Very truly yours,

/s/ Thomas C. Vasaly
THOMAS C. VASALY
Assistant Attorney General
Health & Licensing Section

(651) 297-5950

[1/28/99

Dear Mr. Vasaly,

CBS News grants permission for the use of the *60 MINUTES* transcript, as outlined above only.

/s/ Heddy Gold]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Filed March 12, 1999

CANONS OF JUDICIAL ETHICS.

PREAMBLE.

In addition to the Canons for Professional Conduct of Lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

ANCIENT PRECEDENTS.

"And I charged your judges at that time, saying Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it unto me, and I will hear it." – *Deuteronomy*, I. 16-17.

"Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous." – *Deuteronomy*, XVI. 10.

"We will not make any justicinries, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it." – *Magna Charta*, XLV.

"Judges ought to remember that their office is *jus dicere* not *jus dare*; to interpret law, and not to make law, or give law.". . . .

"Judges ought to be more learned that witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue.". . . .

"Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions though pertinent.". . . .

"The place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purpose thereof ought to be preserved without scandal and corruption.". . . . – *Bacon's Essay "of Judicature."*

Judicial Canon 1. Relations of the Judiciary.

The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct

which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

Opinion 166 – It is improper for a judge to participate in a radio program sponsored by a commercial concern, in which legal advice is given.

Judicial Canon 2. The Public Interest

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

Opinion 180 – A judge should not use or permit others to use the power or prestige of his office to promote his candidacy for reelection or to further the success of a political party.

Judicial Canon 3. Constitutional Obligations

It is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they should

fearlessly observe and apply fundamental limitations and guarantees.

Judicial Canon 4. Avoidance of Impropriety.

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

Opinion 15 – In some situations a judge may testify as to the good character of a defendant in a criminal trial over which he is not presiding.

Opinion 52 – It is improper for a judge to conduct a newspaper column of comment on current news items and matters of general interest.

Opinion 67 – It is improper for a judge to permit a broadcast of court proceedings.

Opinion 80 – It is improper for a judge to accept a loan from a lawyer on a second mortgage having no investment value.

Opinion 166 – It is improper for a judge to participate in a radio program sponsored by a commercial concern, in which legal advice is given.

Opinion 248 – A judge should not allow his name to be used for solicitation of charitable contributions.

See also *Opinion [illegible]*

Judicial Canon 5. Essential Conduct.*

A judge should be temperate, attentive, patient, impartial, and since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

Judicial Canon 6. Industry.

A judge should exhibit an industry and application commensurate with the duties imposed upon him.

Judicial Canon 7. Promptness.

A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

Judicial Canon 8. Court Organization

A judge should organize the court with a view in the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

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* In this Canon, as well as in Judicial Canons, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 21, 25, 26, 28, 32, by the amendment of September 30, 1957 the first word "He" was changed to "A judge."

It is desirable too, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.

Judicial Canon 9. Consideration for Jurors and Others.

A judge should be considerate of jurors, witnesses and others in attendance upon the court.

Judicial Canon 10. Courtesy and Civility.

A judge should be courteous to counsel, especially in those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

A judge should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

Judicial Canon 11. Unprofessional Conduct of Attorneys and Counsel.

A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counselors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.

Judicial Canon 12. Appointees of the Judiciary and Their Compensation.

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view, solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

Judicial Canon 13. Kinship or Influence

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

Opinion [Illegible] –
A judge should not permit the firm of which he was formerly an active member to continue using his name.

Opinion 200 – While a judge should, when feasible, avoid sitting without colleagues in a case in which a near relative is counsel, a lawyer need not refuse to accept employment in a case because it may be heard before a near relative.

See also A.B.A. Report for 1921, pp. 69-70.

Judicial Canon 14. Independence.

A judge should not be swayed by parties on demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust critism.

Judicial Canon 15. Interference in Conduct of Trial.

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of

the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

A judge should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

Judicial Canon 16. Ex parte Applications.

A judge should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act, upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to communicate the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

Judicial Canon 17. Ex parte Communications.

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

Judicial Canon 18. Continuances.

Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper appreciation of their duties to the public interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the court.

Judicial Canon 19. Judicial Opinions.

In disposing of controverted cases a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding

of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that Courts of Appeal in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

Judicial Canon 20. Influence of Decisions Upon the Development of the Law.

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of man, and that he violates his duty as a minister of justice under such a system if he

seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary of arbitrary power, but a judge under the sanction of law.

Judicial Canon 21. Idiosyncrasies and Inconsistencies.

Justice should not be mandated by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

To imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

Opinion 212 – Broadcasting of court proceedings is improper.

Judicial Canon 22. Review.

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant in the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided by full and fair bill of exceptions or otherwise; any failure in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

Judicial Canon 23. Legislative.

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversy; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

Judicial Canon 21. [sic] Inconsistent Obligations

A judge should not accept inconsistent duties; nor incur obligations pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

Opinion 22 – It is improper for a state judge to hold membership in the National Guard or Reserve Officers' Corps. Overruled *Opinion 215.*

Opinion 53 – It is improper for a judge to conduct a newspaper column of comment on current news items and matters of general interest.

Opinion 80 – The making of a loan by a lawyer to a judge on second mortgage having no investment value, is improper.

Opinion 215 – A judge may properly be a member of the National Guard or the Officer Reserve Corps. *Opinion 22* overruled.

Opinion 242 – A city justice judge whose jurisdiction is limited to trials of misdemeanors and examination of felony cases may not, ethically, represent defendants in criminal cases in the Circuit Court.

See also under Professional Canon 11.

Judicial Canon 25. Business Promotions and Solicitations for Charity.

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities nor should he enter into any business relation which, in the normal course of events reasonably

to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

Opinion [Illegible]
– A judge should not permit the firm of which he was formerly an active member to continue using his name.

Opinion 166 – It is improper for a judge to participate in a radio program sponsored by a commercial concern, in which legal advice is given.

Opinion 2[illegible]
– A judge should not allow his name to be used for solicitation of charitable contributions.

Opinion [Illegible]
– A judge may not serve as director of a bank.

Judicial Canon 26, Personal Investments and Relations.

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information, coming to him in a judicial capacity, for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of margin.

Opinion 200 – While a judge should, when feasible, avoid sitting without colleagues in a case in which a near relative is counsel, a lawyer need not refuse to accept employment in a case because it may be heard before a near relative.

Judicial Canon 27. Executorships and Trusteeships

While a judge is not disqualified from holding executorships or trusteeships, he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are not to come before him judicially, or to be involved in questions of law to be determined by him.

Judicial Canon 28. Partisan Politics.*

While entitled to entertain his personal views of political questions, and while not required to surrender

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* Canon 28 of the Judicial Ethics was amended at the Fifty-sixth Annual Meeting, in 1933. The original Canon was worded as follows:

his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities. Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.

Opinion 113 – A judge should not appear at political meetings and indicate support of candidates for office;

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

It was amended September 20, 1950 by adding the last sentence in the second paragraph.

nor should he permit his wife to give political teas.

Opinion [Illegible] –
A judge should not make political speeches, endorse candidates, hold lace on party committee, or engage generally in partisan politics. He cannot act as party treasurer.

Opinion 259 – Contributions to and participation in campaign by judges seeking election or re-election.

Judicial Canon 29. Self-Interest.

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

Opinion 170 – A judge may not perform any act involving the exercise of judicial discretion in matters in which a corporation of which he is a stockholder is a party litigant.

Judicial Canon 30. Candidacy for Office.*

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in

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* Canon 30 of Judicial Ethics was amended at the Fifty-sixth Annual Meeting, in 1933. The original Canon was worded as follows:

office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it

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A candidate for judicial position should not make or suffer others to make for him, promises of conduct, in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding judicial office he should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.

If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion

cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

Opinion 93 – It is improper for a candidate for judgeship to radiocast opinions on legal problems submitted on his invitation.

Opinion 105 – Judges seeking election or appointment should not solicit the aid of lawyers by letter or otherwise.

Opinion 130 – A judge should not use the power or prestige of his office to promote his candidacy for office by sending out a form letter requesting endorsement.

Opinion 161 – A special or pro tem judge may practice in the court over which he temporarily presides in matters not connected with his special service, where this is contemplated by the local statute.

Opinion 164 – A municipal judge may, without resigning, become a candidate for election in a district judgeship.

Opinion 180 – A judge should not use or permit others to use the power or prestige of his office to promote his candidacy for reelection or to further the success of a political party.

Opinion 193 – A judge should resign judicial office before becoming a candidate for non-judicial office.

Opinion 195 – A county judge should resign before becoming a candidate for office of city commissioner.

Opinion 226 – While lawyers may contribute in the campaign fund of judges whose election they honestly favor, such contribution should in every case be reasonable, and preferably be made to a campaign committee.

Judicial Canon 31. Private Law Practice

In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

If forbidden to practice law, he should refrain from accepting any professional employment while in office.

He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties and is not forbidden by some positive provision of law.

Opinion 30 – A public prosecutor in one state may not defend a person accused of crime in another state. (*Judicial Canon 31* applied by analogy.)

Opinion 30 – A prosecutor may not accept private employment in connection with any matter which he investigated in an official capacity. (*Judicial Canon 31* applied by analogy.)

Opinion 62 – It is improper for a judge to conduct a newspaper column of comments on current news items and matters of general interest.

Opinion 66 – Police and juvenile judges in rural communities may defend indigent prisoners in superior courts.

Opinion 110 – An inferior court judge should not exercise his judicial authority in a criminal proceeding which arises out of a matter in which he is also acting as attorney for the complainant.

Opinion 135 – A prosecuting attorney should not represent private litigants in an action based on substantially the

same facts as those which he investigated in an official capacity. (*Judicial Canon 31* applied by analogy.)

Opinion 138 – An inferior court judge who is permitted to practice may accept employment from a person who three years earlier was a defendant in a criminal case in his court.

Opinion 142 – A judge should not practice in a court over which he occasionally presides. It is not proper for the partner of a judge to practice before the court over which he presides.

Opinion 242 – A city police judge whose jurisdiction is limited to trials of misdemeanors and examination of felony cases may not, ethically, represent defendants in criminal cases in the Circuit Court.

Judicial Canon 32. Gifts and Favors.

A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

Opinion 89 – It is improper for a judge to accept a loan from a lawyer on property which has no investment value.

Opinion 226 – While lawyers may contribute to the campaign fund of judges whose election they honestly favor, such contribution should in every case be reasonable and preferably be made to a campaign committee.

Judicial Canon 33. Social Relations.

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct.

Opinion 143 – A judge should not permit the firm of which he was formerly an active member to continue using his name.

Judicial Canon 31. A Summary of Judicial Obligation.

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

Opinion 62 – It is improper for a judge to conduct a newspaper column of comment on current news items and matters of general interest.

Opinion 67 – It is improper for a judge to permit a radio broadcast of court proceedings.

Opinion 166 – It is improper for a judge to participate in a radio program sponsored by a commercial concern, in which legal advice is given.

See also *Opinion 130.*

Judicial Canon 35. Improper Publicizing of Court Proceedings.*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that, this restriction shall not apply in the broadcasting or televising under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are

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* Adopted September 30, 1937; amended September 1952 by adding "or televising" and "distract the witness in giving his testimony," in the first paragraph, and by adding the second paragraph.

designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

Opinions 67, 212 – Broadcasting of court proceedings is improper.

Judicial Canon 36. Conduct of Court Proceedings.*

Proceedings in court should be so conducted as to reflect the importance and seriousness of the inquiry to ascertain the truth.

The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively at the bar or the court, and the clerk should be required to make a formal record of the administration of the oath, including the name of the witness.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Filed March 12, 1999

CANON 5[2]

A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

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[2] Introductory Note to Canon 5: There is wide variation in the methods of judicial selection used, both among jurisdictions and within the jurisdictions themselves. In a given state, judges may be selected by one method initially, retained by a different method, and selected by still another method to fill interim vacancies.

According to figures complied in 1987 by the National Center for State Courts, 32 states and the District of Columbia use a merit selection method (in which an executive such as a governor appoints a judge from a group of nominees selected by a judicial nominating commission) to select judges in the state either initially or to fill an interim vacancy. Of those 33 jurisdictions, a merit selection method is used in 18 jurisdictions to choose judges of courts of last resort, in 13 jurisdictions to choose judges of intermediate appellate courts, in 12 jurisdictions to choose judges of general jurisdiction courts and in 5 jurisdictions to choose judges of limited jurisdiction courts.

Methods of judicial selection other than merit selection include nonpartisan election (10 states use it for initial selection at all court levels, another 10 states use it for initial selection for at least one court level) and partisan election (8 states use it for initial selection at all court levels, another 7 states use it for initial selection for at least one level). In a small minority of the states, judicial selection methods include executive or legislative appointment (without nomination of a group of potential appointees by a judicial nominating commission) and court selection. In addition, the federal judicial system utilizes an executive appointment method. See State Court Organization 1987 (National Center for State Courts, 1988).

A. ***All Judges and Candidates.***

(1) Except as authorized in section 5B(2), 5C(1) and 5C(3), a judge or a candidate* for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization*;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or

(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

Commentary. – A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

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* See Terminology, "candidate."

* See Terminology, "political organization."

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket.

(2) A judge shall resign from judicial office upon becoming a candidate* for a non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law* to do so.

(3) A candidate* for a judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family* to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

Commentary. – Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

(b) shall prohibit employees and officials who serve at the pleasure of the candidate,* and

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* See Terminology, "candidate."

* See Terminology, "law."

* See Terminology, "member of the candidate's family."

shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly* permit any other person to do for the candidate* what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly* misrepresent the identity, qualifications, present position or any other fact concerning the candidate or an opponent;

Commentary. – Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges.

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* See Terminology, "knowingly."

* See Terminology, "candidate."

Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the ABA Model Rules of Professional Conduct.

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5a(3)(d).

B. *Candidates Seeking Appointment to Judicial or Other Governmental Office.*

(1) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate* for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

* See Terminology, "candidate."

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office;

(b) a non-judge candidate* for appointment to judicial office may, in addition, unless otherwise prohibited by law*:

(i) retain an office in a political organization,*

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.

Commentary. – Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

* See Terminology, "candidate."

* See Terminology, "law."

* See Terminology, "political organization."

Although under Section 5b(2) non-judge candidates seeking appointment to judicial office are permitted during candidacy to retain office in a political organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy. See Sections 5B(1), 5B(2)(a), 5E and Application Section.

C. *Judges and Candidates Subject to Public Election.*

(1) A judge or a candidate* subject to public election* may, except as prohibited by law*:

(a) at any time

(i) purchase tickets for and attend political gatherings;

(ii) identify himself or herself as a member of a political party; and

(iii) contribute to a political organization;*

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy;

* See Terminology, "candidate."

* See Terminology, "public election."

* See Terminology, "law."

* See Terminology, "political organization."

(iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and

(iv) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

Commentary. – Section 5C(1) permits judges subject to election at any time to be involved in limited political activity. Section 5D, applicable solely to incumbent judges, would otherwise bar this activity.

(2) A candidate* shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forms and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year] before an election and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

* See Terminology, "candidate."

Commentary. – Section 5C(2) permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are reasonable under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible.

Section 5C(2) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

(3) Except as prohibited by law*, a candidate* for judicial office in a public election* may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

Commentary. – Section 5C(3) provides a limited exception to the restrictions imposed by Section 5A(1).

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* See Terminology, "law."

* See Terminology, "candidate."

* See Terminology, "public election."

D. *Incumbent Judges.* A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law,* the legal system or the administration of justice, or (iii) as expressly authorized by law.

Commentary. – Neither Section 5D nor any other section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

E. *Applicability.* Canon 5 generally applies to all incumbent judges and judicial candidates.* A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to [Rule 8.2(b) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)

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* See Terminology, "law."

* See Terminology, "candidate."

Application of the Code of Judicial Conduct

A. Anyone, whether or not a lawyer, who is an officer of a judicial system[3] and who performs judicial functions, including an officer such as a magistrate,

* * *

[3] Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. Administrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges. See, e.g., Model Code of Judicial Conduct for Federal Administrative Law Judges, endorsed by the National Conference of Administrative Law Judges in February 1989.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Filed March 12, 1999

CODE OF JUDICIAL CONDUCT

Adopted by the Supreme Court February 20, 1974

Canon

1. A Judge Should Uphold the Integrity and Independence of the Judiciary.

2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.

3. A Judge Should Perform the Duties of His Office Impartially and Diligently.

4. A Judge May Engage in activities to Improve the Law, the Legal System, Judicial Administration, and the Administration of Justice.

5. A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties.

6. A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities.

7. A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.

Compliance with the Code of Judicial Conduct.

Effective Date of Compliance.

Canon 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) a judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements

* * *

B. **Expense Reimbursement.** Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. **Public Reports.** a judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extrajudicial compensation to the judge. His report should be made annually, on or before the first day in May of each year, and should be filed as a public document in the office of the State Court Administrator. Canon 6C shall become effective on May 1, 1975.

Canon 7

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS JUDICIAL OFFICE

A. **Political Conduct In General.**

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2).

(2) a judge holding an office filled by public election between competing candidates, or a candidate for such office, may accept invitations to attend and speak on his own behalf at other than partisan political gatherings during the year in which he is a candidate for election or reelection.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, judicial administration, or the administration of justice.

B. **Campaign Conduct.**

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public

election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2), or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) an incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Compliance with the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. **Part-time Judge.** A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Selected Pages From Committee Appointed By The Supreme Court To Review Judicial Canons

Filed March 12, 1999

* * *

- gifts for weddings and other special occasions from relatives or friends as long as it is commensurate with the occasion; and

- loans, scholarships and fellowships on the same terms generally available to non-judges or other applicants (*Section 4D(5) and Commentary,* pp. 30-33);

■ Clarifies that judge may serve as fiduciary for estate, trust or person of a member of judge's family if service will not interfere with judicial duties and estate or trust will not likely be involved in adversary proceedings before the court on which the judge serves or one under its appellate jurisdiction (*Section 4E and Commentary,* pp. 33-34);

■ Creates exception to prohibition against judges practicing law that allows judges to, without compensation, give legal advice to, and draft or review legal documents for, a member of the judge's family, but may not act as advocate or negotiator or make an appearance as counsel (*Section 4G and Commentary,* p. 35);

■ Adds new requirement that retired judges who intend to serve in a part-time judicial capacity may not practice law while available for judicial assignment but may serve as arbitrator or mediator (*Section 4F, and Commentary to Section 4G,* pp. 34-35);

■ Adds new exception authorizing candidates for judicial office to respond to false information and personal attacks or attacks on the candidate's record (*Section 5A(3)(e); Commentary to Section 5A(1),* pp. 42, 39);

■ Replaces previous blanket prohibition against announcing views on disputed legal or political issues with prohibition against making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court[6] (*Section 5A(3)(d)(i), (ii) and Commentary,* pp. 41-42);

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[6] Code provisions identical to the present Minnesota provision have been successfully challenged in three of cases as unconstitutionally vague and overbroad. *See American Civil Liberties Union, Inc. v. The Florida Bar,* F.Supp. 1094 (N.D. Fla. 1990); *J.C.J.D. v. R.J.C.R.,* 803 S.W.2d 953 (Ky. 1991); *Stetton v. Disciplinary of S.Ct. of Pa.,* 944 F.2d 137 (3rd Cir. 1991); *Beshear v. Butt,* 773 F.Supp. 1229 (E.D. Ark. 1991) *reversed procedural grounds* 966 F.2d 1458. Although one case upheld the provision, the court was forced to adopt a narrow construction (*Stetton, supra*), and in another case in which the narrow construction was expressly stated in the [illegible] the provision was again struck down as unconstitutionally vague and overbroad. *Buckley v. Illinois Judicial Inq[illegible] Board,* No. 92-3279 (7th Cir. 1993). Moreover, the ABA version has survived such a constitutional chall[illegible] *Ackerson v. Kentucky Jud. Ret. & Removal Com'n,* 776 F.Supp. 309 (W.D.Ky. 1991). The Committee felt the present Minnesota provision would clearly be challenged, and that the expense involved could be spared adopted a less restrictive approach.

The committee also recognized that disciplinary proceedings under the ABA provision might be more difficult. The Committee felt, however, that the ABA provision strikes an appropriate balarce between the difficulty of proceed[illegible] and the public's need for knowledge, and that a debate during a campaign regarding the propriety of candidates announcing

- Regulates all candidates for appointment to judicial office and judges seeking appointment to other governmental office by:
  - prohibiting solicitation or acceptance of funds, personally or by committee, to support the candidate;
  - permitting contact with appointing authorities and committees;
  - permitting the seeking of endorsements from organizations that regularly make recommendations for appointments to the office; and
  - permitting only non-judge candidates to retain office in a political organization, attend political gatherings, and pay ordinary assessments and contributions to a political organization (*Section 5B and Commentary,* pp. 42-43);
- Clarifies that all candidates for public judicial election may speak to gatherings on their own behalf, appear in media advertisements supporting their own candidacy, and distribute promotional campaign literature supporting their own candidacy (*Section 5C(1),* pp. 43-44);
- Establishes a new, one year limit for solicitation of contributions and public support prior to a judicial election (*Section 5C(2),* pp. 44-45); and

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their views may have greater public benefit than a disciplinary proceeding held long after the campaign has faded from the public eye. Campaign violations in non-judicial elections are invoked more often in finger pointing during the campaign than in litigation following the campaign. The Committee also felt that Minnesota could benefit from the experience of other states that have already adopted the ABA provision.

- Clarifies application of Code to referees and judicial officers and requires a new judge to comply immediately with all provisions except 4D(2), 4D(3) and 4E, which relate to certain fiduciary and business activities and which must be complied with as soon as reasonably possible but in any event within one year (*Application Section and Commentary,* pp. 47-51).

All of the above additions, clarifications and modifications are recommended for adoption by the Committee. Some clarifications, additions and modifications in the 1990 ABA Model Code were not adopted, and the Committee recommends that additional changes be made, including (section and page references are to the accompanying set of proposals):

- Retention of requirement that judges shall take or initiate "appropriate disciplinary measures" against a judge or lawyer for unprofessional conduct of which the judge "becomes aware" (*Minn. Section 3C(1),* p. 17). 1990 ABA Model Code mandates reporting of violations that raise a "substantial question" as to another judge's "fitness for office," when the judge has "actual knowledge" of such violations, and allows discretion to choose appropriate action when there is a "substantial likelihood" that less serious violations have occurred (*ABA Section 3D(1),* p. 17);

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA, THIRD DIVISION

[Caption Omitted In Printing]

Filed March 12, 1999

STANDARDS OF PROFESSIONAL RESPONSIBILITY

Adopted by the Supreme Court on March 29, 1972

Analysis

I. A Judge Should Uphold the Integrity and Independence of the Judiciary.

II. A Judge Should Perform the Duties of His Office Fairly and Diligently.
   - A. Adjudicative Responsibilities.
   - B. Administrative Responsibilities.
   - C. Disqualification.
   - D. Financial Interest.

III. A Judge May Engage in Activities for the Improvement of the Law, the Legal System, and the Administration of Justice.

IV. A Judge Should Regulate His Extra-Judicial Activities so as to Minimize Conflict with His Judicial Duties.
   - A. Avocational Activities.
   - B. Civic and Charitable Activities.
   - C. Financial Activities.
   - D. Fiduciary Relationships.
   - E. Arbitration.
   - F. Practice of Law.
   - G. Extra-Judicial Appointments.

V. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of his Activities.

VI. A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities.

VII. A Judge Should Not Engage in Political Activity Except to the Extent Necessary to Obtain or Retain Judicial Office Through an Elective Process.

VIII. Compliance with Standards of Judicial Responsibility.

Rule 1 PROFESSIONAL RESPONSIBILITY

I. A Judge Should Uphold the Integrity and Independence of the Judiciary

A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of judicial conduct so that the integrity and independence of the judiciary may be preserved.

II. A Judge Should Perform the Duties of His Office Fairly and Diligently

The judicial duties of a judge have priority over his other activities. His judicial duties include all the duties of his office prescribed by law. In performance of these duties, the following standards apply:

A. Adjudicative Responsibilities. A judge should be faithful to the law, and maintain his professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism. He should also:

1. Be patient, dignified, and courteous toward litigants, jurors, witnesses, lawyers, and others who appear before him, and require like conduct by his staff, court officials, and lawyers.

2. Maintain order and decorum in proceedings before him.

3. Accord to every person who is legally interested in a proceeding, or his lawyer on his behalf, full right to be heard according to law, and, except as authorized by law, neither solicit nor accept *ex parte* or other communications concerning the proceeding, or an impending proceeding.

4. Dispose promptly of the business of the court, and without being arbitrary, secure the cooperation of court officials, litigants, and lawyers to that end.

5. Refrain from making any extra-judicial public statement about a pending proceeding.

6. Prohibit broadcasting, televising, recording, or taking photographs in the courtroom and its environs during sessions of court or recesses between sessions, except that a judge may authorize:

(i) The use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record for appellate review, or for other purposes of judicial administration;

(ii) The broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(iii) The photographic or electronic reproduction by recognized educational institutions of appropriate court proceedings for use exclusively in their curricula.

B. Administrative Responsibilities. A judge should diligently discharge his administrative responsibilities, should maintain professional competence in judicial administration, and should facilitate the performance of the administrative responsibilities of other judges and court officials. He should also:

1. Require his staff and subordinate court officials to observe the standards of fidelity and diligence that apply to him;

2. Correct or report to an appropriate disciplinary body serious misconduct by lawyers of which he may become aware;

3. Exercise his power of appointment on the basis of merit, and confine compensation and reimbursement of appointees within the limits of law and in accordance with the fair value of services rendered.

C. Disqualification. A judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

1. He has a fixed belief concerning the merits of the matter before him, or personal knowledge of evidentiary facts concerning it;

2. He has previously served as a lawyer in the matter in controversy, or has been a material witness concerning it;

3. He or his spouse is within the (third) degree of relationship to a person, or the spouse of a person, who:

(a) Is a party to the proceeding or an officer or director of a party;

(b) Is acting as a lawyer in the proceeding;

(c) Is known by the judge to have a substantial interest in the matter in controversy or the affairs of a party to the proceeding;

(d) Is to the judge's knowledge likely to be a material witness in the proceeding.

4. He knows that he, individually or as a fiduciary, or any member of his immediate family, or any member of his family residing in his household, has a financial interest:

(i) in the subject matter in controversy,

(ii) in a party to the proceeding, or

(iii) that could be substantially affected by the outcome of the proceeding.

A judge should make reasonable effort to inform himself about his personal and fiduciary financial interests and those of the members of his family residing in his household. For the purposes of this subsection:

A. "Fiduciary" means executor, administrator, trustee, guardian, and the like.

B. "Member of his immediate family" means spouse, child, grandchild, parent, or a person standing in fact or in law in such relationship.

C. "Member of his family residing in his household" means any relative by blood or marriage, or a person treated in fact as a relative, who resides in the judge's household.

D. **"Financial interest"** includes any legal or equitable economic interest, however small, and any relationship as director, advisor, or other active participant, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities.

(ii) a fiduciary office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization.

(iii) the proprietary interest of a policyholder in a mutual insurance company, or of a depositor in a savings association, or a similar interest in a like organization, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

(iv) ownership of government bonds is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the bonds.

A judge disqualified by the terms of subdivision C(3), or by subdivision C(4) but whose interest is insubstantial, may if he chooses to do so disclose fully and in writing the basis of his disqualification to an appropriate court officer, who shall transmit a copy of the statement to each party and his lawyer, if any. If the parties and lawyers all agree in writing to remit the judge's disqualification, the agreement shall be filed with such officer, and the judge may participate in the proceeding. The judge's statement and the agreement signed by all parties and lawyers shall be incorporated in the record of the proceeding.

III. A Judge May Engage in Activities for the Improvement of the Law, the Legal System, and the Administration of Justice

Subject to the proper performance of his judicial duties, a judge may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially issues that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may serve as a member, officer, or director of an organization devoted to the improvement of the law, the legal system, and the administration of justice. He may endorse the efforts of such an organization to raise funds, and may participate in their management and investment.

C. He may consult with and appear before executive or legislative bodies and officials only on matters of judicial administration.

IV. A Judge Should Regulate His Extra-Judicial Activities so as to Minimize Conflict with His Judicial Duties

A. Advocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports and other social and recreational activities, if they do not detract from the dignity of his office or interfere with his judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not

reflect adversely upon his impartiality or interfere with his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

1. He should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or that it will be regularly engaged in adversary proceedings in any court.

2. He should not solicit funds or other assistance for any educational, religious, charitable, fraternal, or civic organization, or use the prestige of his office for that purpose, but a judge may be listed as an officer or director of such an organization.

C. Financial Activities. A judge should observe the following restrictions concerning his financial activities:

1. He should not serve as officer, director, employee, or advisor of any business organization, nor should he take an active role in the management of any business.

2. He should refrain from financial and business dealings that tend to reflect adversely upon his impartiality or integrity, or that interfere with the proper performance of his judicial duties. Subject to this requirement, he may own a farm, ranch, or other property and engage in activities ordinarily incident to ownership of such property.

3. He should manage his investments and other financial interests so as to minimize the number of cases in which he is disqualified. He should divest himself as soon as possible without serious financial

loss of all investments and other financial interests that might require frequent disqualification.

4. Except as provided in this subsection, neither a judge nor the members of his immediate family should accept gifts, favors, or loans from a lawyer, party, or others whose interests are likely to come before him. A judge should not accept a gift, bequest, or favor from any other source of a value exceeding $100 unless it is from a member of his family or he reports it in the same manner as a receipt of compensation for non-judicial activities. Ordinary social hospitality shall not be considered a gift.

A judge is not required to report the acceptance of:

(i) a loan by a lending institution in its regular course of business on the same terms available to persons who are not judges;

(ii) law books supplied by publishers on a complimentary basis for official use;

(iii) a scholarship or fellowship awarded to a member of his family on the same terms applied to other applicants.

5. Except as provided in this Rule and Rules II and VI, a judge is not required to disclose his income, debts, or investments.

6. Confidential information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Relationships. A judge should not serve as an executor, administrator, trustee, guardian, or

other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with his judicial duties. As a family fiduciary he is subject to the following limitations:

1. He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings, in the court on which he serves or one under its appellate jurisdiction.

2. While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Arbitration. A judge should not act as an arbitrator.

F. Practice of Law. A judge should not practice law.

G. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee or commission that is charged with resolving issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge may represent his country, state, or locality on ceremonial occasions and in connection with educational and cultural activities.

V. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of his Activities

A judge should show respect for and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

A judge should not allow his family, social, or business relations or friendships to influence his judicial conduct or judgment. He should not knowingly permit others to convey the impression that they have special influence with him, or lend the prestige of his office to advance a private business interest. He should not testify as a character witness.

VI. A judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by these Rules if such payments are from a source that does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following limitations:

A. Compensation should not exceed a reasonable amount, and should be no more than a person who is not a judge would receive for the same activity.

B. Expense reimbursement should be limited to the actual cost of travel, food, and lodging expenses reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount constitutes compensation.

C. He should report the date, place, and nature of any activity for which he receives compensation, and the name of the payor and the amount of any sum so received. His report should be made at least annually and should be filed as a public document with the clerk of the court on which he serves or in such other place as is designated by rule of court.

VII. A Judge Should Not Engage in Political Activity Except to the Extent Necessary to Obtain or Retain Judicial Office Through an Elective Process

A judge or candidate for elective judicial office should not solicit funds for, or pay an assessment or make a contribution to, a political organization or candidate except as authorized below; he should not act as a leader or hold any office in a political organization; he should not make speeches for a political organization or candidate or publicly endorse any candidate for non-judicial public office; and he should not engage in any other political activities except on behalf of measures to improve the administration of justice.

A. A judge should resign his office when he becomes a candidate either in a party primary or in a general election for any non-judicial office.

B. During the campaign period for judicial office filled by an elective process, a candidate may attend political gatherings and speak on behalf of his own candidacy, and where permitted by law he may pay an assessment or make a contribution to his party or organization.

C. A candidate should make no pledges or promises of conduct in office other than the faithful and impartial performance of the judicial duties of the office; he should not announce his views on disputed legal or political

issues; and he should not misrepresent his identity, qualifications, present position, or other fact.

D. He should not knowingly allow his secretary, clerk, bailiff, or other court personnel to do for him what he is prohibited from doing under this Rule; and except to the extent authorized under subsection E below, he should not knowingly allow any other person to do for him what he is prohibited from doing under this Rule.

E. A candidate for elective judicial office should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure funds for his campaign and publicly stated support for his candidacy. A candidates' committees may solicit funds for his campaign no earlier than (180) days before primary election and no later than (180) days after the last election in which he participates during the election year. The committees are not prohibited from soliciting campaign contributions and public support from lawyers.

F. A candidate for elective judicial office should maintain the dignity appropriate to judicial office. The spouse of a candidate for judicial office should adhere to the same standards of political conduct that apply to the candidate.

VIII. Compliance with Standards of Judicial Responsibility

A. For the purpose of these Rules, a "judge" is an officer of the judicial system who performs judicial

functions, whether or not a lawyer. All judges should comply with these Rules except that:

1. A part-time judge:

(a) Is not required to comply with Rule IVC(1), D, E, F, and G; and Rule VIC;

(b) Should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, nor act as a lawyer in a proceeding in which he has acted as a judge or in any other proceeding related thereto.

2. A retired judge who receives compensation and is eligible for recall to judicial service should comply with all provisions of these rules.

B. A person to whom these standards become applicable should as soon as reasonably possible arrange his affairs to comply with them. A person who holds judicial office may, if the demands on his time and the possibility of conflicts of interest are not substantial, nevertheless:

1. Continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family;

2. Continue to act as an officer, director, or nonlegal advisor of a family business if he was acting in that capacity at the time he became a judge.

C. A judge who violates any of the preceding rules shall be subject to discipline by the Minnesota Commission on Judicial Standards. Supreme court and district court judges are subject to discipline by the Minnesota

Commission on Judicial Standards only to the extent permitted by the Constitution of Minnesota.

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

December 3, 2001

James Bopp, Esq.
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, IN 47807-3510

Re: 01-521 – Republican Party of Minnesota v. Kelly

Dear Mr. Bopp:

The Court today entered the following order in the above stated case:

> "The petition for a writ of certiorari is granted limited to Question 1 presented by the petition."

The following items are enclosed: Memoranda describing the procedures under the Rules, a Specification Chart, Guide for Counsel, Memoranda to Brief Printing Companies, and Counsel of Record Information Form. Inasmuch as this case will be argued in the **March Session**, please note that requests for extensions of time are not favored.

If you have any question, please telephone me.

Sincerely,

WILLIAM K. SUTER, CLERK

/s/ Denise J. McNerney
Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

Enclosures

Supreme Court, U.S.
FILED
JAN 17 2002
OFFICE OF THE CLERK

No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief for Petitioners Republican Party of Minnesota, et al.

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January 17, 2002

10 pp

James Bopp, Jr., Thomas J. Marzen, and Richard E. Coleson are Counsel for, and file this brief on behalf of, the following Petitioners: Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, and Michael Maxim.

QUESTION PRESENTED

Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceedings below:

Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, Michael Maxim, Gregory F. Wersal, Campaign for Justice, and Kevin J. Kolosky; *Petitioners*;

Verna Kelly was, in her official capacity, Chairperson of the Minnesota Board of Judicial Standards, and has been succeeded by Suzanne White, present Chairperson of the Minnesota Board of Judicial Standards; Edward J. Cleary, in his official capacity as Director of the Minnesota Office of Lawyers Professional Responsibility; Charles E. Lundberg, in his official capacity as Chair of the Minnesota Lawyers Professional Responsibility Board; *Respondents*.[1]

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement remains unchanged. *See Petition for a Writ of Certiorari* at ii.

[1]Respondents are referred to herein collectively as "the State" or "Minnesota."

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The appellate decision denying petitions for rehearing and rehearing en banc, Appendix to *Petition for a Writ of Certiorari* ("P. App.") 130a, is not yet reported. The appellate opinion, P. App. 1a-93a, is reported at 247 F.3d 854. The district court opinion, P. App. 94a-129a, is reported at 63 F. Supp. 2d 967.

JURISDICTION

Appellate judgment was entered April 30, 2001. P. App. 7a. Rehearing and rehearing en banc petitions were denied June 26. P. App. 130a. Jurisdiction exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & REGULATORY PROVISIONS

The First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983 are printed in the *Petition for a Writ of Certiorari* at 1-2. Minnesota Code of Judicial Conduct Canon 5 is printed at P. App. 130a-135a.

STATEMENT OF THE CASE

Petitioners adopt the Statement of the Case ("Statement") in the Brief of Co-Petitioners Gregory F. Wersal, et al., ("Wersal Br.").

SUMMARY OF THE ARGUMENT

The people of Minnesota have chosen popular elections to select their state judiciary, and the First Amendment has its fullest and most urgent application to the speech of judicial candidates during elections. They have also sought to assure the independence of their judiciary through various constitutional provisions that protect the courts generally, and judges especially, from outside influences that would compromise the actuality or appearance of judicial impartiality.

There is no doubt that the State has a compelling interest in assuring judicial impartiality, and judicial impartiality in deciding particular cases is fully protected by measures, such as recusal, which are not at issue here. In addition, it is legitimate for the State to regulate judicial campaign conduct and speech in various ways to ensure that they are conducted in a way that will not undermine the public perception of judicial impartiality.

However, the announce clause at issue in this case goes too far by prohibiting a judicial candidate from "announc[ing] his or her views on disputed legal or political issues." Minn. Canon 5A(3)(d)(i). Except in exceptional circumstances, judges can be trusted to comply with their oath and decide particular cases in accordance with the law and the facts. Thus, a judge's impartiality is not reasonably questioned merely because she has previously expressed her views on the law. The announce clause, however, without justification, implies the opposite conclusion.

Since judges have a different role than legislators, a judicial candidate may be prohibited from making pledges or promises of certain results in particular cases once in office. However, because state court judges are empowered to make law through the common law and the legitimate exercise of their discretion, the people of Minnesota are entitled to know the judicial candidates' general views on the law in order to make an informed choice. The announce clause deprives the voter of such information and is thus overbroad.

Furthermore, judicial candidates have a legitimate interest in commenting on their general views of the law during campaigns. Judges' views on the law have often already been

publicly expressed through legal writings, public speeches, public service or judicial opinions. These views are subject to attack by third parties and news reporters, but the announce clause prohibits a response by the candidate or his close supporters, potentially undermining public trust and confidence in the judiciary.

Because the free speech rights of judicial candidates, their supporters, and the voters are violated here, the announce clause is subject to strict scrutiny under the First Amendment. However, the announce clause does not pass this exacting scrutiny since it is not necessary to advance any compelling state interest and since it is not the least restrictive means to do so. The announce clause is not necessary to advance the State's interest in the public perception of judicial impartiality because the relation of the announce clause to the interest is too attenuated. Less restrictive means include prohibiting pledges and promises, that more directly address any concerns here. The state has failed to meet its burden by showing that the public expression of a candidate's general views on legal and political issues will have a substantial likelihood of materially prejudicing the public's perception of judicial impartiality.

Finally, people can be trusted. The public values judicial impartiality, and the announce clause undermines the ability of voters to recognize and weed out judges that are not impartial. But, ultimately, whether one prefers election or appointment of judges, the people of Minnesota have retained for themselves the power to select judges through elections, and the announce clause subverts this decision. Thus, the court below erred in holding that the First and Fourteenth Amendments were not violated by the announce clause.

ARGUMENT

I. The Announce Clause Violates the Free Speech Rights of Judicial Candidates, Their Supporters, and the Voters.

The announce clause[2] violates the rights of judicial candidates, their supporters, and the voters through content-based restrictions on freedom of speech, as explained in Wersal's Brief, incorporated herein by reference. Wersal Br. at III. The Eighth Circuit agreed. P. App. 15a-20a. It agreed that the clause is subject to strict scrutiny, requiring narrow tailoring to serve a compelling interest. P. App. 20a. It also found that "a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order," P. App. 21a, with which Petitioners agree. However, it erroneously held that the announce clause was "necessary to serve the compelling interest" here, P. App. 52a, and that it was "narrowly tailored to further compelling [state] interests." P. App. 56a.[3]

II. Prohibiting Public Expression of General Views on the Law by Judges Does Not Advance the State's Compelling Interest in Judicial Impartiality.

The announce clause is not necessary to serve any compelling state interest.

---

[2]The "announce clause" provides that "A candidate for judicial office . . . shall not . . . announce his or her views on disputed legal or political issues." Minnesota Code of Judicial Conduct, Canon 5A(3)(d)(i). P. App. 133a-34a.

[3]Petitioners herein adopt the Wersal Brief.

A. Judicial Impartiality, Rather than Judicial Independence, Is at Issue in this Case.

There is a "longstanding Anglo-American tradition of an independent Judiciary," *United States v. Will*, 449 U.S. 200, 217 (1980).[4] Minnesota "has historically pursued the ideal of an independent judiciary." P. App. 22a. It is a judge's solemn duty to "preserve the integrity and independence of the judiciary" because "[a]n independent and honorable judiciary is indispensable to justice in our society." 52 Minn. Stat. Ann., Code of Jud. Conduct, Canon ("Minn. Canon") 1; *see also* 1972 ABA Canon 1 (cited in *Thode* at 7).

Minnesota enacted constitutional provisions with "the explicit . . . goal . . . to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992). These constitutional or structural foundations support the two key components of judicial independence: the institutional independence of the courts and individual independence of judges. Report of the ABA Commission on Separation of Powers and Judicial Independence, *An Independent Judiciary* (visited Dec. 27, 2001) ("*ABA Report*") <http://www.abanet.org/govaf-

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[4]The need for an independent judiciary is a matter of international concern, *see, e.g.*, David K. Malcolm, *Law Reform in Australia and the Asia Pacific Regions*, Globalization and Law Reform: Cooperation Through Technology (visited Dec. 29, 2001) <http://www.wa.gov.au/lrc/lawreform>, and international thinking about an independent judiciary has influenced our own. *See* E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 45 (1973) ("*Thode*") (citing the Conclusions of the 1959 International Congress of Jurists at New Delhi for the rationale of Canon 1 of the 1972 American Bar Association ("ABA") Code of Judicial Conduct ("1972 ABA Canon")).

fairs/judiciary/rover.html>. Institutional independence "involves matters affecting the operation of the judiciary as a separate branch of government," *id.*, freeing the judiciary from "legislative or executive control." Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson*, 12 St. John's J. Legal Comment. 69, 70 (1996) ("*Remarks*"). Individual independence "is both substantive, in that it allows judges to perform the judicial function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, adequate compensation and security," *ABA Report*, ensuring that "individual judges decide cases fairly, impartially and according to the facts and the law, not according to whim, prejudice, or the dictates of the legislature or executive, or the latest opinion poll." *Remarks* at 70.

Minnesota has taken steps to assure both institutional[5] and individual independence.[6] Minnesota has thus pursued "the search for an independent judiciary," P. App. 23a, through structural constitutional provisions while insisting, in its Constitution, that judged be subject to periodic elections. The Minnesota Constitution wants impartial judges, not judges

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[5]To protect institutional independence, it makes the judiciary a separate branch of government, Minn. Const. art. 6 (1857), exclusively vested with the judicial power. Minn. Const. art. 6, § 1 (1982).

[6]To protect individual independence, Minnesota requires that judges be "learned in the law," Minn. Const. art. 6, § 5 (1857), with compensation that "shall not be diminished during their term of office," Minn. Const. art 6, § 5 (1982), and with a guaranteed six-year term. Minn. Const. art 6, § 8 (1956). Judges may not hold any other state or federal office, except in the military reserve. Minn. Const. art 6, § 6 (1982). Only judges who are disabled, incompetent, or guilty of conduct prejudicial to the administration of justice may be removed or disciplined. Minn. Const. art. 6, § 9 (1857).

completely independent from the political process. Petitioners do not challenge these structural provisions; in fact, their existence demonstrates that there are ways to protect judicial impartiality without imposing on First Amendment rights.

Judicial independence is "a means toward a strong judicial institution," Stephen G. Breyer, *Comment: Liberty, Prosperity, and A Strong Judicial Institution*, 61 Law & Contemp. Probs. 4 (1998) ("*Breyer*"), which serves as "a guarantee of judicial impartiality." *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 58 (1982) (plurality opinion) (Brennan, J.). "Judicial impartiality is linked to, though slightly different from, the concept of judicial independence." 597 Parl. Deb., H.L. (5th ser.) 1453, 1454 (Mar. 1, 1999) (speech by Lord Chancellor (Lord Irvine of Lairg)) ("*Lord Chancellor Speech*"). Structural provisions for judicial independence provide a framework allowing judges to decide cases independent "from any executive or other interference." *Id.* "The criteria for independence are not absence of influence, but rather the freedom to decide according to one's own conscience and opinions." *Iwa v. Consolidated-Bathurst Packaging Ltd.* [1990] 1 S.C.R. 282.

"Judicial impartiality requires the judges themselves to put their obligations of fidelity to law and compliance with their judicial oath above personal preferences." *Lord Chancellor Speech*. Thus, "impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and parties in a particular case." *Valente v. The Queen* [1985] 2 S.C.R. 673. It suggests a judge "disinterested in terms of the outcome and who is likely to be persuaded by the evidence and the argument submitted." *R. v. S* [1997] 3 S.C..R. 484.

However, this case is not about judicial independence per se because Minnesota's constitutional framework guarantees it, and Petitioners challenge none of it.[7] Nor do Petitioners seek to impose any duty on judicial candidates to take any position in course of a campaign. Petitioners have challenged only the announce clause, which the State defends as necessary to protect "the judges' obligation to render impartial decisions based on the law and facts." P. App. 44a-45a.

This case is about judicial impartiality – about whether the public expression of general views on disputed legal and political issues during a campaign by judicial candidates so undermine the State's interest in judicial impartiality that such speech may be banned. The Eighth Circuit was correct when it identified two separate state interests – independence and impartiality – but erred when it thought that judicial independence, separate from the State's compelling interest in judicial impartiality, was implicated in this case. P. App. 21a-27a. If any interest justifies the announce clause, it would be the State's compelling interest in judicial impartiality.

B. The State's Compelling Interest in Judicial Impartiality Seeks to Prevent Prejudgment or Bias in Deciding Particular Cases.

The State's compelling interest in judicial impartiality seeks to prevent both prejudgment and bias in deciding particular cases. A judge's duty is to be "faithful to the law" and to "perform judicial duties without bias or prejudice." Minn. Canon 3A(2) & (5); *see also* 1990 ABA Code of Judicial Conduct,

[7]Furthermore, Petitioners have not challenged disclosure provisions regarding campaign financing, which also promote an impartial judiciary. Minn. Stat. §§ 10A.01 subd. 10 and 10A.20.

Canon 3B(2) & (5) ("1990 ABA Canon"), *cited in* Lisa L. Milord, *The Development of the ABA Judicial Code* 74 (1992) ("*Milord*")). Prejudgment of a case is contrary to the judge's obligation to make a decision based on the law and facts of the particular case. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) ("If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery."). A judge is not faithful to the law if she decides a case based on bias or prejudice against particular litigants. *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.").

The Eighth Circuit correctly found that the interest in judicial impartiality involves apparent and actual partiality. P. App. 26a; *see also Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring) ("One of the very objects of law is the impartiality of its judges in fact and appearance."). As to judicial candidates announcing their general views on disputed legal and political issues during a campaign, the Eighth Circuit found an appearance of partiality – candidates may "imply[] how they would decide cases that might come before them as judge[s]" (P. App. 45a) – and actual partiality – judges may feel somewhat bound by prior statements in deciding cases. P. App. 46a-47a.

But a distinction exists between ensuring judicial impartiality in deciding a particular case and protecting the public perception of judges generally as impartial decisionmakers. The law protects against actual or perceived partiality of judges *in deciding particular cases* through disciplinary, disqualification

and recusal rules, as well as due process protections. If a judge makes a statement in a campaign giving rise to a reasonable perception of partiality in a particular case, numerous remedies exist if the case is assigned to him. Therefore, the announce clause is directed at something other than protecting litigants or the judiciary from actual or perceived partiality when judges are asked to decide particular cases.

The only remaining rationale for the clause would be protecting the public perception of judicial impartiality – a concern that exists in only the most general and amorphous way when considered apart from judicial impartiality in particular cases.

Promoting public confidence in the judiciary – including perceived judicial impartiality – is a compelling interest, but the announce clause is not an effective, much less least-restrictive, way to advance this interest. Public perception of the judiciary is based on numerous factors[8] having nothing to do with judicial candidates' statements in elections. Fortunately, the American people have high regard for the judicial system,[9] and "the more

[8]Public perception of the judiciary is influenced by many factors, with many remedies suggested. *See generally* Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 New Eng. L. Rev. 914, 915 (1996) ("*The Confidence Game*"). Two important national surveys conducted in 1999 demonstrate the complexity of public perception. *See* American Bar Association, *Perceptions of the U.S. Justice System* (visited Dec. 26, 2001) <http://www.abanet.org/media/perception/home.html> ("*ABA Survey*"); National Center for State Courts, *How the Public Views the State Courts* (visited Dec. 26, 2001) <http://www.ncsc.dni.us/ptc/eis/national/Publications/Publications.htm> ("*NCSC Survey*").

[9]Eighty percent agreed that "in spite of its problems, the American justice system is still the best the best in the world." *ABA Survey* at 6.

knowledge people have about the justice system the greater their confidence." *ABA Survey* at 7. Judges fair well in surveys.[10] While many respondents believe "politics influences court decisions," the "views held by respondents in states that appoint judges or use merit selection do not differ greatly from those of respondents in states where judges are selected through partisan elections." *NRSC Survey* at 43. This data suggests that voters view judges as part of the political system generally, and thus responsive to some political influence, but that neither appointment nor election poses any significantly greater risk.[11]

However, there are ways of improving public confidence in the judiciary. A National Center for State Courts report identified fifteen confidence issues, with the three key ones as unequal treatment in the justice system, the high cost of accessing the system, and lack of public understanding. A plan was developed around these three issues "for building public trust and confidence" in the judiciary. National Conference on Public Trust and Confidence in the Justice System, *National Action Plan: A Guide for State and National Organizations* 4, 16 (visited Dec. 26, 2001) <http://www.ncsc.dni.us/ptc/eis/national/Publications/Publications.htm> ("*NCSC Report*").

Minnesota attempts to protect public perceptions of its judiciary through numerous restrictions on what judicial

[10]Eighty percent agreed that "[j]udges are generally honest and fair in deciding cases." *NCSC Survey* at 30.

[11]The NCSC Survey reported on a Texas survey that found that "respondents both roundly criticized campaign fund-raising by judges and overwhelmingly chose election as their preferred method of judicial selection." *Id.* at 43.

candidates may say or do during elections. Candidates are prohibited from holding office in a political organization, attending political party gatherings, seeking or using political party endorsements, and soliciting funds for a political organization. Minn. Canon 5A(1)(a), (d), (e). Judges must resign to become candidates for non-judicial offices. Minn. Canon 5A(2). Judges are severely limited in their own fundraising activities. Minn. Canon 5B(2).

Candidate speech is limited in many justified ways, such as through prohibitions against publicly endorsing other candidates or making speeches on behalf of any political party, Minn. Canon 5A(1)(b) and (c), making promises of conduct in office, misrepresenting an opponent's identity, qualifications, present position or other fact, and manifesting bias or prejudice inappropriate to public office. Minn. Canon 5A(3)(d)(i) and (ii).

As to a judge's expression of views on the law, the announce clause is irrational because it only applies to what judicial candidates say during election campaigns. The views of candidates will nevertheless often be known. Incumbent judges express their views on disputed legal and political issues through written opinions. But the judge cannot publish campaign literature telling voters "if you want to know my views, read the following, which comes from my decision in the *John Doe* case." Furthermore, judicial candidates have often spent their professional lives discussing the law and their views on it. News reporters and commentators interpret the views of candidates to the electorate even if candidates cannot.

Thus, the announce clause does not effectively insulate the public image of the judiciary from perceptions influenced by knowledge of the judges' views. In any event, absent a pledge

to decide a particular case a certain way, public airing of general views on the law by judges does not give rise to an unacceptable appearance of partiality. *See infra* at II.C.3

Therefore, the relationship between public confidence in the judiciary and the announce clause is too attenuated to justify such a draconian ban on speech. The announce clause is a broad prophylactic rule and "[p]rophylaxis is the antithesis of narrow tailoring." *Hill v. Colorado*, 530 U.S. 703, 762 (2000) (Scalia, J. dissenting) (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. . . . [since] [p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.")).

Finally, accepting the premise underlying the announce clause – that public expression of the general views of a judge on the law during a campaign creates an unacceptable risk of public perception of partiality – necessarily implies that judges are incapable of complying with their oath to decide cases on the law and facts before them. Our Nation's history demonstrates that, with rare exceptions, American judges are made of hardier stuff.

C. Judges Can Be Trusted to Comply with Their Oath and Decide Cases Impartially.

Judges are bound by oath to decide cases based on the law and facts of a particular case. English, then American, judges have generally taken that oath seriously, and it is presumed they will decide cases before them impartially.[12] This presump

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[12] "[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly

tion of impartiality means that judges need not recuse themselves on remand, even though they decided the case wrongly:

> Some may argue that a judge will feel the "motivation to vindicate a prior conclusion" when confronted with a question for the second or third time, for instance, upon trial after a remand. Ratner, Disqualification of Judges for Prior Judicial Actions, 3 How. L.J. 228, 229-230 (1957). Still, we accept the notion that the "conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect." *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943). The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office.

Liteky, 510 U.S. at 562 (Kennedy, J., concurring); *see also McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998) (recognizing "the presumption that a judge has discharged his or her judicial duties properly"). The announce clause unjustifiably reverses this presumption when judges express general views on the law.[13]

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depends upon that presumption and idea." 3 W. Blackstone, Commentaries *361. "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926).

[13]An announcement by this Court that judges generally cannot be trusted to follow their oaths of office simply because they have stated a general view on a disputed legal or political issue would itself be a devastating blow to the public's perception of judicial impartiality.

1. Public Expression of the Views of Judges Is a Necessary Judicial Function.

Judicial opinions are a judge's most frequent, comprehensive expression of views on disputed legal and political issues. They require candor, and "[c]andor . . . is necessary to put future litigants and lawyers on notice of the state of the law." *The Confidence Game* at 915. The announce clause does not ban expression of a judge's views through written opinions, even during a campaign, for this would cut to the heart of the judicial function. The obligation to issue legal opinions requires a judge to express views on disputed legal and political issues during the heat of the campaign – to her benefit or detriment.

The Minnesota rules are a patchwork of inconsistent decisions. A judge may freely express her general views on the law[14] in law review articles, law school speeches, and speeches before the bar or other interested organizations. Minn. Canon 4B; 1990 ABA Canon 4B. A judge may advocate changes in the substantive law. Minn. Cannon 4B; 1990 ABA Canon 4B. But Minnesota's announce clause does not allow the judge to make announcements about her earlier efforts to improve the law by recommending changes in the substantive law.[15] The specialized audiences that the judge typically addresses might be less inclined to assume that a judge's expressed views dictate a result in a particular case, but they would also be better able to

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[14]"Law" is defined broadly to include "court rules as well as statutes, constitutional provisions and decisional law. 1990 ABA Canon Terminology.

[15]Commentary to the 1990 ABA Canon 4 explains that judges are in a "unique position to contribute to the improvement of the law," including revision of "substantive and procedural law," and thus judges are "encouraged to do so," through a bar association or independently. *Milord* at 84.

exploit legal implications these views may entail. And prospective candidates[16] who are not yet judges, may state their views before declaring their candidacies.

Reporters and commentators will interpret to the general public the views of judges and judge-candidates expressed to specialized audiences. Interest groups and the press will communicate a message about the candidate's alleged views, however imperfectly or dramatically.

The announce clause, merely prevents judicial candidates from speaking to voters directly, with appropriate clarity and restraint – including when necessary to correct distortions.[17] It does not effectively insulate voters from knowing the views of candidates for judicial office. If the public expression of those views is enough to give rise to a public perception of partiality, then the announce clause does not serve the purpose of suppressing knowledge of candidates' views. Its primary effect is to silence judicial candidates, exposing them to misleading

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[16]A "candidate" is "a person seeking selection for or retention in judicial office by election. A person becomes a candidate . . . as soon as he or she makes a public announcement . . . files as a candidate . . . , or authorizes solicitation or acceptance of contributions or support." 1990 ABA Canon Terminology.

[17]The announce clause's suspicious restraint on judges' speech is ironic, since a judge is a "person specially learned in the law," and "in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice." Minn. Canon 4 Comments. A judge is especially suited to explain how her prior decisions conformed to the law, how the judicial system functions to ensure a just result, and the importance of judicial independence. Yet the announce clause prohibits a judge from speaking about much of this at the very time that her message may most need to be heard.

and unjustified attacks that they may not answer, and, thereby, promoting voter ignorance of judicial candidates' genuine views and undercutting the public perception of judicial impartiality.

2. The Announce Clause Does Not Protect Judicial Impartiality in Particular Cases.

When a judge is deciding a particular case, judicial impartiality is fostered and protected through numerous court procedures, judicial canons, statutes, and the United States Constitution.

First, a substantial part of the judicial process is intended to ensure justice by mitigating the effects of judges' peculiar legal views, biases, and prejudices. Most obvious is the right to appeal and multiple-judge appellate panels. Each ensures that a single judge's peculiar view of the law is not the final word.

Second, in addition to the judge's duty to be "faithful to the law" and to "not be swayed by partisan interests, public clamor or fear of criticism," 1990 ABA Canon 3B(2), many more specific judicial canons serve to protect judicial impartiality. Ex parte communications about cases are almost always prohibited, 1990 ABA Canon 3B(7), discouraging "telephone justice," i.e., "the telephone call from the party boss in the middle of the night . . . telling the judge how to decide the case." *Breyer* at 3. Judges are enjoined from permitting familial, social, political, or other relationships, or membership in organizations, from influencing their conduct in office. 1990 ABA Canons 2B, 2C. Judge's extra-judicial activities are regulated, including financial and business dealing, associations with business entities, and investments and gifts, to prevent reasonable doubts about impartiality. 1990 ABA Canon 4.

Judges are subject to disqualification "if the judge's

impartiality might reasonably be questioned" due to situations involving the judge's family and former professional relationships, financial dealings, ownership of property, and knowledge about the case. ABA Canon 3E(1). A federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), or for proven "bias or prejudice." 28 U.S.C. § 144.[18] Disqualification requires "deep-seated and unequivocal antagonism that would make fair judgment impossible. *Liteky*, 510 U.S. at 555; *see also id.* at 558 (Kennedy, J., concurring) ("[A] judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.").

Finally, the due process clause of the United States Constitution sets the floor. Due process requires trial before an unbiased judge, *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971), but "only in the most extreme of cases" is disqualification required. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 825-26 (1986). It must be shown that the judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* at 821-22 (citation and quotation marks omitted).

The particular case is protected, and the announce clause adds nothing here.

3. Expression of General Legal Views Creates No Improper Appearance of Partiality.

[18]In addition, the Code of Conduct for United States Judges, 175 F.R.D. 363 (1998), "provide[s] guidance to judges and nominees for judicial office," but has been used to provide "standards of conduct" in disciplinary actions under 28 U.S.C. §§ 332(d)(1), 372(c). 175 F.R.D. at 364.

The Eighth Circuit was concerned that discussion of disputed legal and political issues judges, even without any pledge or promise to decide a particular case in a certain way, "conveys a judicial candidate's propensity to decide cases in a particular way," P. App. 49a, and thus may be prohibited by the announce clause. Application of disqualification provisions and due process protections to judicial discussion of general views on legal matters is instructive because a particular case is when the search for partiality would be most rigorous to prevent injustice to specific litigants. Thus, if the Eighth Circuit's concern were ever justified, it would be strongest in the treatment of particular cases. However, it is not.

It is uniformly accepted in both federal law, 28 U.S.C. § 455(b)(1), and under the ABA Canons that disqualification is

> only required if there is bias concerning a *party*, as distinguished from bias concerning an *issue* in the case. . . . [Thus] a judge need not disqualify himself if bias arises from his beliefs as to the *law* that applies to a case. A judge may have fixed beliefs about principles of law that would not mandate disqualification. Otherwise, a judge could not write books or articles or speak on legal subjects – all activities expressly permitted under [1990 ABA] Canon 4B. Indeed, after deciding cases and creating precedent for years, it would be incredible if the judge did not form some fixed ideas about the law.[19]

[19]The original draft of the 1972 ABA Canon 3C(1)(a), which required disqualification if a judge "had a fixed belief concerning the merits," was changed to the "personal bias or prejudice" standard for fear the original draft would require a judge "to disqualify himself if he had a fixed belief about the law applicable to a given case." *Thode* at 61. "[T]he [ABA drafting] commit-

Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 820-21 (West Group 2000) (emphasis in original) ("*Legal Ethics*"). *See, e.g.*, regarding the federal disqualification statute, *Laird v. Tatum*, 409 U.S. 824, 835-36 (1972) (Rehnquist, J., on motion to recuse); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996); *United States v. Barry*, 961 F.2d 260 (D.C. Cir. 1992); *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991); *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987); *Southern Pac. Communications v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980); regarding state disqualification canons, *Papa v. New Haven Fed'n of Teachers*, 444 A.2d 196 (Conn. 1982); *Department of Rev. v. Golder*, 322 So. 2d 1 (Fla. 1975);[20] regarding due process requirements,[21] *Brown v. Doe*, 2 F.3d 1236 (2d Cir. 1993); *Schurz Communications v. FCC*, 982 F.2d 1057 (7th Cir. 1992); *Leaman v. Ohio Dept. of Mental Retardation & Dev. Disabilities*, 825 F.2d 946 (6th Cir. 1987); *Cipollone v. Liggett Group*, 802

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tee recognized the necessity and the value of judges having fixed beliefs about constitutional principles and many other facets of the law." *Id.*

[20]Minnesota cases are in accord. *Roatch v. Puera*, 534 N.W.2d 560 (Minn. 1995); *Collection of Delinquent Real Property Taxes v. American Fundamentalist Church*, 530 N.W.2d 200 (Minn. 1995); *In re Welfare of D.L.*, 486 N.W.2d 375 (Minn. 1992); *Nachtsheim v. Wartnick*, 411 N.W.2d 882 (Minn. 1987).

[21]This Court has found that prior expressions of views on issues that then came before administrative adjudicators did not require disqualification, *FTC v. Cement Institute*, 333 U.S. 683 (1948); *United States v. Morgan*, 313 U.S. 409 (1941), which apparently put this question to rest.

F.2d 658 (3rd Cir. 1986).[22] Since the general discussion of one's views is not sufficient to disqualify a judge in a particular case, when the interest in an impartial judiciary is at its height, prohibiting such utterances in the general context in which the announce clause operates cannot be justified.

III. The Announce Clause Is Not Narrowly Tailored to Protect the State's Interest in Judicial Impartiality.

The announce clause is not narrowly tailored to promote a compelling interest, because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests," *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), making it overbroad because it is not the "[least] restrictive alternative [to] serve the Government's purpose." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

A. The Announce Clause Prohibits a Broad Category of Speech Relevant to Judicial Office.

1. The Announce Clause Sweeps Too Broadly.

The language of the announce clause is broad: "A candidate for judicial office, including an incumbent judge . . . shall

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[22]*But see Republic of Panama v. American Tobacco Co.*, 217 F.3d 343, 250 F.3d 315, *rehearing en banc denied*, 265 F.3d 299, 300 (5th Cir. 2001) (Wiener, J., dissenting) ("The panel opinion for this case marks the first time in the history of American jurisprudence that an appellate court has reversed a trial judges's discretionary refusal to recuse himself – and has ordered the judge recused – based solely on the fact that many years earlier, while he was a practicing attorney, he had been linked (erroneously at that) with one view of a legal issue that was then pending in state court and . . . [that view] is now being espoused by one of the parties in a case pending before him.").

not . . . announce his or her views on disputed legal or political issues." Minn. Canon 5A(3)(d)(i).[23] Nearly every legal or political issue is disputed, and nearly every issue is potentially legal or political.[24] Furthermore, allowing judicial candidates to speak about their resumes and court administration[25] still does not allow judicial candidates to express their general views on the law, which is what this case is about. The Seventh Circuit in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993), explained the breadth of the announce clause:

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[23]Minnesota has a separate provision that prohibits inappropriate expressions of bias or prejudice by a judicial candidate, Minn. Canon 5A(3)(d)(ii), which Petitioner did not challenge. Thus, the announce clause deals only with the prejudgment aspect of judicial impartiality, which is how the Eighth Circuit correctly viewed it. P. App. 45a-47a.

[24]An expression on a "disputed" legal or "political" issue is not confined to taking sides, for example, on controversial topics, individual candidates, or political parties. "Political" is defined as: "[p]ertaining or relating to the policy or the administration of government, state or national . . . ." *Black's Law Dictionary* 1158 (6th ed. 1990). "Dispute" is defined as: "[a] conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other . . . ." *Id.* at 472. A judicial candidate might thus violate the announce clause by merely announcing general views on an elective judicial selection system or on whether judicial candidates should be allowed to express their general views on disputed legal and political issues, since both of these are matters of some controversy.

[25]As the Eighth Circuit understands the clause, which Petitioners do not question, it also does not forbid candidates from discussing "information about their character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits and abilities" or "how they would handle administrative duties if elected." P. App. 54a.

> [It] is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not "announce his views on disputed legal or political issues," period. . . . He ean say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. . . . The rule thus reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in an election. Indeed, the only safe response to [the announce clause] is silence.

Id. at 228. Finally, the scope of the prohibition is expanded exponentially by applying it to the candidate's family and friends,[26] an issue that the Eighth Circuit did not even address.

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[26]Under Canon 5A(3)(a) and (c), P. App.133a, candidates "shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate" and "shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing." This effectively forbids friends and family from speaking about the general views of the candidate, choking off information about the candidate from those who know the candidate best. Indeed, Wersal was concerned that third parties, over whom he had little control, would engage in activities that would subject him to ethical complaints. J.A. 113.

The judicial impartiality interest does not justify restricting the speech of others than the judge. According to the Eighth Circuit, "[w]e rely on the State's interest in its judges' integrity and independence, which requires keeping judges from doing (or appearing to do) things that compromise their neutrality, rather than keeping others from talking or writing about them." P. App. 27a. The announce clause, by this additional provision, "keep[s]

In an effort to reduce the breadth of the announce clause and to sustain its constitutionality, P. App. 53a, the Eighth Circuit adopted two glosses on the clause. The effort fails on three grounds: (1) it fails to narrow the breadth of the clause, (2) it renders the clause unconstitutionally vague, and (3) the clause is not readily susceptible to the construction.

First, the district court and the Eighth Circuit construed the announce clause to "apply only to discussion of a candidate's predisposition on issues likely to come before the candidate if elected to office." P. App 52a. But limiting the clause to issues "likely to come before them as judges," P. App. 53a, does not narrow its scope. As the Seventh Circuit explained in rejecting an identical gloss on an identically worded announce clause, "the district judge's interpretation does not in fact circumscribe [the "announce clause"] significantly," because "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Buckley*, 997 F.2d at 229.

From the perspective of the candidate and voter, "issues likely to come before the court" are precisely the ones they care about and the ones most likely to be discussed and debated by the press and others. Few will care about issues that will never come before Minnesota courts, like admiralty law or preventing ocean beach erosion, or matters irrelevant to the

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others from talking or writing about them." But speech restrictions are inappropriate in view of the independent rights of the candidates' family members. *See Supreme Court of New Jersey v. Gaulkin*, 69 N.J. 185, 351 A.2d 740 (1976) (court would no longer adhere to prohibition on a nonjudicial spouse's engaging in political activity).

judge's job, like golf scores or favorite fishing lures.[27]

The Eighth Circuit also believed that "general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause." P. App. 54a. This construction of appears to be precluded by the Minnesota Supreme Court's interpretation of Minn. Canon 7B, the predecessor to Minn. Canon 5A, which contained the identical announce clause. In *Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979), the court was confronted with an allegation that a candidate for judicial office had violated Minnesota's election law by distributing "false information," Minn. Stat. 210A.04(1), about his opponent's court administration. Finding the statements not "factually inaccurate" and the statute not violated, *Bundlie*, 276 N.W.2d at 71, the court opined that it interprets "false information" in light of Minn. Canon 7B:

> "False information" of necessity has a different meaning where an incumbent judge is prevented by judicial ethics from raising money to respond effectively to half-truths and directly justifying his position on legal issues and prior decisions from the bench than does the same phrase have in campaigns involving contestants not similarly restricted.

Id. at 72. The Minnesota court thus appears to interpret the Canon to prevent an incumbent judge from "directly justifying

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[27]The clause's limitations may cause debased judicial campaigns. *See, e.g.*, Editorial, *Hail to the . . . judge*, Chicago Tribune, 2002 WL 2610400 (Jan. 9, 2002) (complaining that judicial ethics force candidates "to act as though they have no opinions on any of the critical issues they will face on the bench," resulting in ads like one featuring "Chief Illiniwek, the symbol of the University of Illinois, dancing about a basketball court").

his position on legal issues and prior decisions from the bench." This is flatly at odds with the construction of the clause imposed by the Eighth Circuit.

The Eighth Circuit's gloss is also inconsistent with the plain language of the announce clause and would render it incomprehensible and thus vague. As Judge Beam, in his Eighth Circuit dissent, explained:

> I cannot fathom "disputed legal issues" more likely to come before a court than the proper role of stare decisis, narrow or strict construction, original intent and substantive due process. Yet are these not captured by the term "judicial philosophy?" The term is as sweeping as the court's allegedly narrow construction.

P. App. 77a.

The announce clause is not readily susceptible to these constructions.[28] Federal courts may only construe a law or

[28]The State first suggested the "likely to come before the court" gloss in Defendant Flinn's summary judgment brief, which invited the district court to narrowly construe Cannon 5 "if necessary to preserve its constitutionality," citing *Stretton*, 944 F.2d at 143-44. District Court Docket # 84 at 26. Plaintiffs responded that "the 'announce clause' is not amenable to such a construction," citing *Buckley*, 997 F.2d at 226. District Court Docket #106 at 22.

In the Eighth Circuit, Defendant Flinn's Appellee Brief, at 48-49, noted that Plaintiffs did not "even mention[] . . . that the district court interpreted the clause in a narrow fashion," *id.* at 48, then devoted six pages to arguing for the construction, *id.* at 49-54, apparently recognizing that Wersal's argument in his Appellant's Brief constituted an implicit rejection of the District Court's construction. In his Reply Brief at 1-5, Wersal argued extensively that Canon 5 was not readily susceptible to the District Court's construction.

regulation to save it from constitutional attack if (1) it is "readily susceptible" to the saving construction,[29] and (2) state courts have not already authoritatively construed it. *Stenberg v. Carhart*, 530 U.S. 914, 938-46 (2000); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395-97 (1988); *Houston v. Hill*, 482 U.S. 451, 468-69 (1987); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216-17 (1975); *Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965).[30] However, the "announce clause" cannot be

This issue, therefore, has been argued below and, while the Eighth Circuit found that Wersal had not properly raised this issue in his opening brief in that court, it dealt with it on the merits. P. App. 52a-53a. In any event, this Court has exercised its discretion to decide matters not properly raised on appeal in circumstances similar to these, *Capital Cities Cable v. Crisp*, 467 U.S. 691, 697 (1984), and to prevent injustice. *Hormel v. Helvering*, 312 U.S. 552, 556-60 (1964); *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, ___n. 27; 121 S. Ct. 1879, 1891 n.27 (2001).

The Eighth Circuit's additional gloss, that "general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause," has a different history. The State first suggested this gloss in Defendant Flinn's summary judgment brief. District Court Docket # 84 at 25-26. Plaintiffs objected to this construction. District Court Docket #106 at 23. The District Court did not adopt this gloss ,but only the "likely to come before the court" gloss. P. App. 129a. In their Briefs before the Eighth Circuit, the State did not argue for this construction. Thus, this gloss first arose on appeal in the Eighth Circuit's opinion itself sua sponte. P. App. 54a. Thus, this issue can properly be raised here.

[29]Federal courts have broader license to construe federal statutes, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 41-43 (1976) (per curiam) (construing "any expenditure . . . relative to a clearly identified candidate" to mean "expressly advocating the election or defeat of a clearly identified candidate"), but state statutes must be "readily susceptible" to such a construction.

[30]Thus, both lower courts were in error because they construed the announce clause based on a mere prediction "that the Minnesota Supreme

narrowly construed because (1) "its language is plain and its meaning unambiguous," *Houston*, 482 U.S. at 468, and (2) the Minnesota Supreme Court has already implicitly interpreted it broadly.

The plain, unambiguous language of the clause prohibits a candidate from "announc[ing] his or her views on disputed legal or political issues." Minn. Canon 5A(3)(d)(i); P. App. 133a-34a. Neither its text nor its context provides justification for the lower courts to play pin the tail on the canon, as they did when attaching "likely to come before the candidate if elected into office" to the announce clause. P. App. 52a. Neither lower court attempted to explain how the announce clause language was readily susceptible to appending ten extra words and a concept not previously present, even in latent form.

The announce clause was adopted by the Minnesota Supreme Court in its unconstrued form. Had that court wanted to add the "likely to come" language on it, it had the opportunity in 1995, when such a change was proposed. In June 1994, the court's own Minnesota Advisory Committee urged the Minnesota Supreme Court to adopt the ABA's 1990 "commitments clause,"[31] P. App. 50a, due to constitutional concerns with the overbreadth of the "announce clause," which was patterned after the ABA's earlier 1972 model. P. App. 8a, 49a-

Court would interpret the announce clause narrowly, consistent with the construction urged upon the Court by the Judicial Board." P. App. 128a, 52a-53a.

[31]Under this clause, a candidate may not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." 1990 ABA Canon 5A(3)(d)(ii) (cited in *Milord* at 99).

50a. The Minnesota Supreme Court refused, P. App.51a, thereby explicitly rejecting the gloss the lower courts attached to the clause in this case.

The Minnesota announce clause, derived from the 1972 ABA Canons, is not the same thing as the 1990 ABA Canon's "commitments clause." The Seventh Circuit held that it is not the "proper business [of the federal courts] to patch up the rule," "transform[ing] the rule into the [1990] ABA Canon." *Buckley*, 997 F2d at 230.[32]

In itself, the announce clause bans speech on a nearly endless set of matters that are the subjects of political and legal controversy in contemporary society. Beyond mere identifying information, assurances that the candidate will perform in office competently, and some administrative recommendations, it is difficult for the candidate to know with any assurance what he or she might safely discuss with the electorate. Thus, what political or legal speech the clause does not freeze, it chills, and the only response is silence.

2. The General Views of Judicial Candidates Are Relevant to the Office Sought.

Judicial candidates have views on disputed legal and political issues that affect their decisionmaking. "Since most Justices [of this Court] come to this bench no earlier that their middle years, it would be unusual if they had not by that time

[32]The Third Circuit in *Stretton*, 944 F.2d 137, construed the announce clause in a manner consistent with the "commitments clause." *Id.* at 144. This case is distinguishable from *Stretton*, however, because the Minnesota Supreme Court here has already had the opportunity to adopt the "likely to come before the court" language and declined. No such state court construction of the announce clause at issue in *Stretton* was available to that court.

formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another." *Laird*, 409 U.S. at 835 (Rehnquist, J.). Lower court judges also have views, *see, generally, In re J. P. Linahan*, 138 F.2d 650 (2d Cir. 1943), that affect their decisionmaking. *See, e.g.,Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (Reinhardt, C.J.,concurring); *see, generally*, J. David Rowe, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 Tex. L. Rev. 597 (1995) ("*Rowe*").

Because judges are empowered to make law, voters have a legitimate interest in knowing the general views of candidates on the law. Leaving aside the debate over instances where it is claimed that judges make law without legal warrant, there are two areas where judges are not "neutral umpires," but have a positive role on the development of the law. First, judges exercise discretion. As one court explained:

> As to relevance, the court is acutely aware that judges routinely exercise their discretion within the confines of the facts and the law. How judges choose to exercise their discretion is a matter of much concern to litigants, lawyers, and the public alike. That concern makes a judicial candidates' views on disputed legal and political issues anything but irrelevant.

American Civil Liberties Union of Florida v. The Florida Bar, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990) ("*ACLU*").

Second, and most importantly for state court judges, the constitutions of the several states empower the state courts to develop and enforce the common law, subject to acts of the legislature. Minnesota state courts have been active in developing common law. *See* Wersal Br. at I.B.3. Thus,

> judges make law on a daily basis. . . . [B]ecause judges make law – or, more precisely, because judge-made law varies, depending upon who is sitting on the bench – the constituents who elect their judges have a right to know the positions of the candidate before they are asked to go to the polls.

Rowe at 613.

As explained below, while it would be improper for candidates to pledge or promise how they would exercise their discretion in a particular case or how they would resolve a particular case, given that the State has chosen to pick judges by popular election rather than by appointment, the voters have a legitimate interest in knowing the values, legal philosophy, and general views of the candidates on the law.

3. Judicial Candidates Have an Interest in Expressing General Views on the Law.

Because judges are silenced during their campaigns by the announce clause, they are forbidden to state their positions in response to matters that arise during their campaigns or by virtue of their previously announced views. This victimizes judicial candidates. Incumbent judges are especially vulnerable. They *must* announce their views on disputed legal and political issues through their opinions and decisions, but the canons "prevent the candidates from being able to respond to attacks on their legal and political beliefs." Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. Rev. 207, 238 (1987) ("*Snyder*").

Candidates who are not presently judges are also disadvantaged unless they cynically "game the system" by expressing views on hot-button political and legal issues and attacking judicial opinions of their future incumbent judge opponents before becoming candidates. Upon becoming candidates, the announce clause protects them from having to explain their carefully designed pre-candidacy record and attacks.

Thus, a practical imbalance is created between the incumbent judge candidate and the challenger. In fulfilling judicial obligations, judges write or join opinions resolving disputed legal and political issues, thereby exposing them to attack, to which they cannot respond. Nor may judges decide cases selectively, with an eye to the upcoming election, but the challenger can design his campaign – selecting issues to comment upon – while the judge must do her duty and hope that her deeds speak louder than the words others say about her. The announce clause would then often work to undercut the public perception of judicial impartiality when questions are raised but must go unanswered.

The announce clause also discourages those who have held office or engaged in public debate on legal or political matters from seeking judicial office. Such candidates have public records that are open to attack or distortion, yet the announce clause prevents them from effectively defending themselves. The announce clause favors candidates with concealed views and legal technicians without a record of stated views. The announce clause thus degrades public perception of judicial impartiality and dilutes the quality of potential candidates.

Ultimately, however, all judicial candidates are subject to

attack, whether meritorious or scurrilous. The press or an interest group might accuse a judicial candidate of membership or sympathy with a controversial group, such as accusing him of being "a card-carrying member" of the ACLU or the Federalist Society. Yet the candidate risks violating the announce clause by denying membership or allegiance to a group's positions, and more so for explaining why the group's goals are salutary.[33]

A candidate might be accused of favoring abortion rights or the right to bear arms, while privately holding opposite views. Yet he would violate the announce clause by publicly stating his true positions on these disputed legal and political issues. Or a candidate might be accused of sexual misconduct or a drunk driving accident in a lawsuit or administrative complaint. Yet, because disputed legal issues are involved, the candidate would be forbidden to explain or defend her conduct or position on such matters.

In sum, the announce clause creates a panoply of inequities and imbalances in an elective judicial system. It prohibits candidates from speaking and the electorate from learning candidates' views from them, yet permits their views to be represented by others. Particularly when those views are under attack, the public's perception of judicial impartiality will suffer if all there is from the judge is silence.

B. The Announce Clause Prohibits More Speech Than Necessary to Advance Impartiality.

The Eighth Circuit opened its analysis of the announce

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[33]If Wersal had been afforded the chance to engage in more open speech, he would have explained past political affiliations. J.A. 125.

clause by correctly observing that:

> [I]t is consistent with the essential nature of campaigns for legislative and executive offices for candidates to detail and make promises about the programs that they intend to enact into law and to administer. For judicial officers, however, a State may determine that this mode of campaigning, insofar as it relates to how judges will decide cases, is fundamentally at odds with the judges' obligations to render impartial decisions based on the law and facts. At the time of the campaign, the candidate simply cannot predict what the facts or arguments in a particular case may be, the precise way in which legal issues will present themselves, or other crucial factors that need be considered before a court issues a final decision.

P. App. 45a. The Eight Circuit supported this conclusion by citing cases that also correctly condemned "particularized pledges and predetermined commitment," *Berger v. Supreme Court*, 861 F.2d 719, 1988 WL 114792 **3 (6th Cir. 1988), and "prejudging issues." *Stretton*, 944 F.2d 137, 142. *See also Buckley*, 997 F.2d, 224, 227 ("Judges should decide cases in accordance with law rather than with any . . . commitments . . . made to . . . campaign supporters or others.").

But from that promising beginning, the court left the realm of pledges and promises and attempted to justify the announce clause. While agreeing that "pledges by candidates to make specific decisions on the bench" "addresses the type of campaign conduct that most blatantly subverts judicial office," the court wanted to reach farther, to prohibit "the specter that candidates are declaring," P. App. 46a, or "implying how they would decide cases that might come before them as judges." P.

App. 45a. This "specter"or "implication" arose simply by announcing one's view on a disputed legal or political issue. The Eighth Circuit has introduced more vagueness by relying on "implications."

As demonstrated, *supra* at II.C.3, a judge stating her position on a disputed legal or political issue has not been found by the courts to suggest improper partiality or prejudgment for purposes of disqualification, discretionary recusal, or denial of due process. When a judge makes a statement in a campaign, a decision in a particular case is not at stake and the statement can be dealt with if such a case arises. If the statement raises a reasonable question about the judge's impartiality, he will be disqualified. So something different is a stake, namely, the public perception of impartiality of the judiciary in general – a weighty interest, but one that prohibiting campaign "pledges and promises" adequately serves.

This is the problem that courts identify: "promises to rule in particular ways in particular cases or types of cases." *Buckley*, 997 F. 2d at 228-30; *Stretton*, 944 F.2d at 142; *Berger*, 1988 WL 114792 at **3; *Morial*, 565 F.2d at 305; *Beshear v. Butt*, 863 F. Supp. 913, 917 (E.D. Ark. 1994); *ACLU*, 744 F. Supp. at 1097 (N.D. Fla. 1990); *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky. 1991). General statements about the law are qualitatively different than "pledges and promises." The latter commits the candidate to rule a certain way in a particular case; the former does not.

The difference between pledges and promises and general statements on the law is illustrated by *In re Kaiser*, 759 P.2d 392 (Wash. 1988). During Judge James Kaiser's reelection

campaign, he stated (1) that he is "Toughest On Drunk Driving" and "TOUGH ON DRUNK DRIVING" and (2) that he is a "*tough, no-nonsense judge*." (Emphasis in original.) The Washington Supreme Court held that the first statements "single out a special class of defendants and suggest that these DWI defendants' cases will be held to a higher standard when tried before Judge Kaiser... [T]hese statements promise exactly the opposite of 'impartial performance of the duties of the office.'" *Id.* at 396.

"In contrast, Judge Kaiser's statements that he is a '*tough, no-nonsense judge*' are pledges and promises of the permissible kind. They suggest nothing more than a strict application of the law and do not single out any particular party for special treatment." *Id.* Judge Kaiser had not prejudged any particular case and, thus, the second statement was simply a statement of his general judicial philosophy. However, this is a statement about a disputed legal and political issue because others argue that judges must be compassionate and fair, should understand the plight of those charged with crime, and should look for the root social causes of crime.

Furthermore, the Eighth Circuit said that judicial candidates are different. P. App. 17a-18a. Petitioners agree. Candidates for legislative and executive office can make pledges and promises of specific conduct while in office. *Brown v. Hartlage*, 456 U.S. 45 (1982). But because judges are different, because they have a duty to decide a case on the basis of the law and facts before them, they can be prohibited, as candidates, from making such promises.[34] *Buckley*, 997 F.2d at 230; *Morial*, 565

[34]Nominees to the bench, like candidates, should confine themselves to "the most general observation[s] about the law," and not "announc[e] in advance, without benefit of judicial oath, briefs, or argument, how [they] would decide a particular question that might come before [them] as . . . judges." *Laird*, 409 U.S. at 836 n.5.

F.2d at 305. However, the announce canon goes way beyond "pledges and promises" and is thus overbroad.

C. There Are More Narrowly Tailored Means to Protect Judicial Impartiality.

As Judge Beam commented in dissent, "Canon 5 runs rampant through acres of protected speech, and in doing so eschews many less restrictive options." P. App. 91a. Petitioner suggests four.

1. A Pledges and Promises Clause Is More Narrowly Tailored.

A pledge or promise clause that prohibits a candidate for judicial office from pledging or promising "to rule in particular ways in particular cases or types of cases, *Buckley*, 997 F. 2d at 230, in conjunction with the other limits on a judicial candidate's actions and speech during an election, *supra* at III.A.1, would be more narrowly tailored. It would directly deal with prejudgment, which is the only purpose of the announce clause, and restrict the kinds of statements most likely to undermine the public's perception of judicial impartiality. Furthermore, this will provide the "bright line" that is necessary to cure both vagueness and overbreadth. *See Buckley*, 424 U.S. at 39-45.

Without an announce clause, however, nothing mandates that judicial candidates express views on any matter, including disputed legal or political matters. Prudence may advise against announcing views on certain political or legal issues, if a judicial candidate believes that she might compromise her impartiality

as a result.

2. Recusal More Narrowly Protects Against Inappropriate Campaign Statements.

As argued, *supra* at II.C.3, disqualification protects the State's compelling interest in the actuality and appearance of judicial partiality in a particular case. This is a less restrictive means to accomplish this purpose. *Deters v. Judicial Retirement and Removal Comm'n*, 873 S.W.2d 200, 205 (Ky. 1994) (Wintersheimer, J., concurring in part and dissenting in part) ("Recusal is a full guarantee for any appearance of impropriety. The requirement of the appearance of impartiality can easily be satisfied by recusal, voluntary or involuntary, of the judge thought to be offending."). As previously explained, the general expressions of a judge's views on law is not sufficient to require recusal. The Minnesota Supreme Court has the power to change this, but it has not done so.

3. Life Tenure Would Protect Judges Against the Concern about Voter Retaliation.

As the Eighth Circuit observed, the prospect of consequent "supporter abandonment at the next election can weigh heavily on judges who know they were elected based on representations they made during the last campaign." P. App. 47a (citing *The Federalist No. 78* at 471 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (arguing against periodic popular election of judges because it gives them "too great a disposition to consult popularity" when rendering decisions)).[35] Life tenure

[35]A sophisticated judge knows that, ultimately, attempts to shape judicial decisions to fit public opinion are bound to fail. "Every decision is a potential land mine and can provide ammunition for an opponent. But it is difficult to tell in advance which decisions will blow up." Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. at 985 (2001).

is a less restrictive means to protect judges from concerns about voter retaliation, a measure that Minnesota has specifically rejected because the people want periodic elections.

4. An Appointment or Merit Selection System Is a More Narrowly Tailored Remedy.

Of course, the least restrictive means to resolve concerns about campaign speech is to eliminate campaigns for judicial office by the adoption of executive appointment or merit selection.[36] Minnesota, with consent of the people, could do this, but, as we know, the people have declined.

IV. There Is Insufficient Empirical Evidence to Justify the Announce Clause.

The State faces a quadruple burden to justify content-based restrictions (1) on the speech of candidates for public office and (2) on the speech of their family and supporters, (3) which deprive voters of necessary information during an election, and (4) which can only be justified by presuming that judges are likely to violate their oath of office.

There is no speech more valuable or protected by the First Amendment than speech by candidates and those associated with them campaigning for elective office. W ersal Br. at VII. Elections would be rendered a sham, and sovereignty of the people in choosing their public officials would be subverted, if the government can deprive the people of the information they

[36]*See, e.g.*, ABA Standing Committee on Judicial Independence, *Standards on State Judicial Selection: Report of the Commission on State Judicial Selection Standards* (July 2000) (supporting a merit-based appointive system) (available online at <http://www.abanet.org/judind/jud_selection.html>).

need to make their choice in an election. The argument that judges have become so solicitous of the general public that they can be expected to violate their oath of office because they merely expressed a view on a legal issue suggests not only that judges are a corrupt breed, but that the electorate prefers the corrupt over the honorable.[37]

Only satisfying the heaviest burden of proof can justify muzzling the right of political candidates to give, and the right of the electorate to receive, necessary information during the course of an election campaign. Where speech is directly restrained, the "exacting scrutiny required by the First Amendment" is imposed. *Buckley*, 424 U.S. at 16. This is especially so here because the "constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

This exacting scrutiny is even more necessary here. *Buckley* involved expenditure and contribution limitations

[37]As demonstrated, *infra* at V.B., the voter does not prefer the corrupt, but values impartiality in judges. Because the public values impartiality, judges showing partiality risk defeat at the polls, and "the voting public may reject a judicial candidate who makes excessive or inappropriate campaign pledges." *Snyder* at 248. This serves as a natural restraint on judicial candidate speech, which has served us throughout our Nation's history. - When it was suggested that Salmon P. Chase – President Abraham Lincoln's nominee to this Court to replace Chief Justice Roger B. Taney – should be questioned on how he would vote on slavery and legal tender laws, President Lincoln responded: "We cannot ask a man what he will do [on the Court], and if we should, and he should answer us, we should despise him for it." Nat Hentoff, *To Get A Supreme Court Seat*, Washington Post, August 14, 1999, at A17.

during a campaign. This Court rejected the notion that the expenditure of money in campaigns introduced a non-speech element, which "reduce[d] the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16: *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). This view, however, is not without controversy on this Court. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

However, no expenditure is involved here. The announce clause prohibits pure speech, such as when a judicial candidate is asked to respond to a question or when she speaks to a bar gathering. *See, e.g.*, J.A. 111, 119, 123, 254-55, 280.To prohibit such speech, the question is whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the government] has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Even "advocacy of use or force or law violation" can only be proscribed "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

For instance, this Court found that a Nevada Rule of Professional Conduct, which prohibited a lawyer from making "an extrajudicial [public] statement . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding," was a "restraint on speech . . . narrowly tailored to achieve [several] objectives," including protecting "the right to fair trial by impartial jurors." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033, 1076 (1991).This standard "accord[s] speech by attorneys

on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 634 (1995).

The announce clause, however, goes well beyond any speech where there is a particularized finding that the speech creates "a substantial likelihood of materially prejudicing an adjudicative proceeding" by undermining the "impartiality" of the judge. Thus, to justify the announce clause at all, the State is required to show that all such speech poses such a "substantial likelihood." As shown below, they have failed to do so.

Finally, while the presumption of impartiality may be overcome in particular cases through judicial disqualification, as explained *supra* at II.C.2, wholesale and categorical rejection of the presumption for all judges who state their views carries "a much more difficult burden of persuasion." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The court must be convinced that "under a realistic appraisal of psychological tendencies and human weakness," public expression of a judge's general views on the law during a campaign "poses such a risk of actual bias or prejudgment that the practice must be forbidden." *Id.*

The State has failed to meet any of these this burdens: It has not proved that there is any concrete evidence showing the harmfulness of candidates publicly announcing their general views during campaigns. The Eighth Circuit cited only two evidentiary supports for the announce clause. First, the history of the ABA Canons, P. App. 49a, and second, an inference drawn from two Minnesota Supreme Court decisions. P. App. 51a.

First, the history of ABA Canons is at best inconclusive on the need for the sweeping prohibitions of the announce clause.

It demonstrates no more than a general concern that some forms of judicial candidate speech can pose an unacceptable risk of undermining public perception of the impartiality of the judiciary, with which Petitioner agrees, and a historical struggle to formulate appropriate language to identify and define such speech. P. App. 49a-50a. The 1972 announce clause itself is of recent origin, which was soon replaced by newer and more precise language. P. App. 50a.

Second, the Eighth Circuit cites two Minnesota Supreme Court cases, *Moon v. Halverson*, 288 N. W. 579 (Minn. 1939); *Pererson v. Stafford*, 490 N.W.2d 418 (Minn. 1992) "comment[ing] on historical problems resulting from close proximity between judicial elections and partisan politics," and then "infer[s] that the prohibition on candidates announcing their general views on disputed issues was intended in part to prevent judicial campaigns from becoming routine political contests." P. App. 51a. But no concrete evidence is adduced demonstrating more than a conjectural, inferential relationship between the announce clause and a legitimate concern with the lack of judicial impartiality arising therefrom. *See id.*

Moreover, no evidence was introduced that, in previous eras without the announce clause, Minnesota suffered from a greater public perception of lack of judicial impartiality or that the strong majority of states that have less-restrictive provisions also suffer.[38] It strains credulity to believe that the ABA and the majority of state supreme courts would abandon the

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[38]In contrast, this Court in *Burson v. Freeman*, 504 U.S.191, 202-205 (1992), noted that the long-standing, ubiquitous character of polling place electioneering restrictions made production of evidence of their effectiveness unnecessary.

1972 announce clause if any of them believed that it was necessary to protect the public's perception of judicial impartiality.

Although the Eighth Circuit did not suggest that there was any specific evidence offered on the harm to impartiality prevented by the announce clause, it held that Petitioners' argument "misapprehends the [State's] evidentiary burden in this case," P. App. 48a, holding that the generalized evidence offered in support of the announce clause was sufficient to the State's burden under *Nixon*, 528 U.S. 377, and *Burson*, 504 U.S.191. P. App. 48a-52a.

Because the announce clause imposes a direct penalty on speech, however, the somewhat relaxed scrutiny on required evidence in *Nixon* and *Burson* has no place here. *Nixon* involved a challenge to campaign contribution limits, which have been held by this Court to be subject to a diminished standard of review. Unlike the exacting scrutiny required when speech is directly restrained, as here, contribution limits could survive if the government demonstrates that the contribution regulation is "closely drawn" to match a "sufficiently important interest." *Nixon*, 528 U.S. at 378 (quoting *Buckley*, 424 U.S. at 25). But this case does not involve contributions made by third-parties to judicial campaigns. It involves speech to be made by a candidate to further the candidate's own campaign.

In *Burson*, 541 U.S. 191 (1992), a plurality of this Court upheld a prohibition on solicitation of votes and display of campaign materials within 100 feet of polling places. The *Burson* Court held that the 100 foot electioneering ban was a "minor geographic limitation" that did not constitute a "significant impingement" on First Amendment rights. *Id.* at 210. The

Court noted, however, "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills v. Alabama*, 384 U.S. 214 . . . (1966)." *Id.* The announce clause sweeps so broadly that it clearly amounts to more than an insignificant restraint on content-based speech akin to the "minor geographical limitation" at issue in *Burson*. It is an absolute prohibition on candidate speech akin to the complete ban on distribution of campaign literature at issue in *Mills*.

Such an absolute prohibition on candidate speech requires clear, compelling and specific evidence that it serves an interest in protecting judicial impartiality. Because no such evidence has been offered in this case, there is insufficient proof that the announce clause serves any compelling interest, much less that it is necessary to protect such an interest, or is the least restrictive means to do so.

V. The Announce Clause Has Untoward Consequences.

A. The Announce Clause Undermines Public Support for Judicial Independence.

Since it is apparent that judges and judicial candidates have views on disputed legal or political matters, there is a danger that silence simply inspires the suspicion that they are concealing their views to mask the judges' partiality or bias. Faith in the impartiality of the judiciary is just as easily lost by implying deceit as by implying allegiance. Thus, "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance

respect." *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

Furthermore, the announce clause stifles positive efforts to promote public confidence in the judiciary. As the Chief Justice of the Wisconsin Supreme Court has observed, an elected judicial system "can increase the citizen's understanding of the judicial function and the need for judicial independence," but "voters' lack of information" is a serious impediment toward this end. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 977 (2001) ("*The Ballot*"). Ultimately, "[t]he public's appreciation of and respect for judicial independence is . . . the best way to ensure that the judiciary will remain independent." *Id.*

B. The Announce Clause Hampers Efforts to Remove Judicial Candidates Who Are Partial.

Voters are concerned about preserving both accountability and judicial impartiality through elections. *See generally* Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 Judicature 216 (1999) ("*Voter Knowledge*"). Thus, because the public values judicial impartiality, voters will "support judges whom they perceive as independent even if they do not agree with particular decisions." *The Ballot* at 986. Furthermore, "voters who would have judges exercise independent judgment also see elections as providing the means for this outcome to occur from public balloting." *Voter Knowledge* at 223. Thus, to the extent that the announce clause deprives voters of knowledge of the partiality of judge candidates, it hampers the ability of the people to identify and weed them out.

Impartial judicial decisionmaking requires a commitment to deciding cases on the law and facts before them and without

regard to, or even contrary to, majority public opinion. The two 1999 public surveys by the NCSC and ABA found strong public support for such impartial decisonmaking by judges. In the NRSC's survey, 83% of the American people disagreed with the statement: "I would prefer that a judge ignore the law to ensure that a defendant is convicted." *NCSC Survey* at 33. In the ABA survey, 57% of the respondents disagreed that "[c]ourt decisions should reflect the majority of public opinion." *ABA Survey* at 66. Thus, there is strong public support for judicial impartiality.

Furthermore, voters will use the ballot to defeat judge candidates who they view as partial. The most famous example is the 1986 California retention election of Chief Justice Rose Bird and her colleagues. The essence of the campaign against them was that they had consistently opposed the death penalty in their decisions because of their personal opposition to the death penalty and, thus, were not impartial. John T. Wold & John H. Culver, *The Defeat of the California Justices: the Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 Judicature 348 (1987). The voters "clearly felt that Bird *had* injected her personal views into her decisions regarding litigation and court administration." *Id.* at 355 (emphasis in original). Other judges viewed as partial have not faired much better. *See* Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. Cal. L. Rev. 535, 542 (1999) (examining the defeat of a candidate for the Texas Court of Appeals due to an unusually light sentence the judicial candidate gave to a man convicted of killing two gay men and accompanied with statements to the effect that "gay people's lives are not worthy of equal respect and protections").

Thus elections are viewed by the voters as a means of protecting judicial impartiality. The announce clause undermines this goal.

C. The Announce Clause Is an Ultimately Futile Effort to Get the Politics out of Politics.

The Eighth Circuit inferred that one of the reasons for the announce clause was "in part to prevent judicial campaigns from becoming routine political contests." P. App. 51a. Thus, state limits on "the content of what a judge may say in [a] campaign" have been characterized as "like trying to take the politics out of politics." *Legal Ethics* at 889.

However, this quest is futile because "[o]nce we gave up drawing our highest judges in a genetic lottery, by birth into the House of Lords, every system of judicial selection other than some form of competitive civil service examination had to be political." Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. Cal. L. Rev. 1995, 1998 (1988). This is fundamentally true because judges, whether appointed or elected, are selected through a political process. Whether the process is election or appointment, a judge is often viewed as beholden to those that got her there and for future advancement. *Snyder* at 257. This is not to say that these influences should not be minimized; they must be in order to preserve the independence and impartiality of the judiciary. But whether by election or appointment, politics plays some role in the selection of judges.

The more fundamental problem here is that the people of Minnesota have chosen *electoral politics* as their vehicle to select judges. Some disagree with this choice and support appointment, including many who criticize the announce

clause.[39] However, the selection of electoral politics for choosing judges necessitates an election – when "the First Amendment comes into play to protect speech that is at the core of the free speech rights." *Legal Ethics* at 889. It is this election that really gives rise to the candidate's need to speak and the voter's need to hear, *see Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J, dissenting); *Renne*, 911 F. 2d at 294-95 (Reinhardt, C. J., concurring), which is undermined by the announce clause.

D. The Announce Clause Undermines the Integrity of the Election of Judges by the People.

If the announce clause were effective in depriving the voting public of information about judicial candidate's general views on disputed legal and political issues, as described above, the voting public would be deprived of information necessary to make an informed choice. Such a result can only be justified by accepting the patronizing implication that the general electorate must be protected from itself by remaining in ignorance. This is, however, completely at odds with our theory of democracy and the nature of the elective process itself. As this Court observed in *Brown*, 456 U.S. at 60:

> [The First] Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with

---

[39] For voters, it seems to be "six of one, half a dozen of another." A substantial majority perceives judges as "negatively influenced by political considerations," which "does not differ greatly" between states with partisan elections and those with appointment or merit selection. *NCSC Survey* at 43.

a compelling justification for limiting speech.

Indeed, as Thomas Jefferson explained:

> I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion.

Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) in John Bartlett, *Familiar Quotations* 344-45 (Justin Kaplan ed., 16th ed. 1992).

The announce clause effectively takes from the people of Minnesota the discretion they have conferred upon themselves. As a result, it has subverted the method which the people chose to select judges, by a free and open election.

CONCLUSION

Petitioners pray this Court to reverse the Eighth Circuit and hold the announce clause of Minnesota Judicial Canon 5A(3)(d)(i) unconstitutional under the First and Fourteenth Amendments.

Respectfully submitted,

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No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief for the Petitioners Gregory F. Wersal, et al.

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January 17, 2002

63pp

QUESTION PRESENTED

Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceedings below:

Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, Michael Maxim, Gregory F. Wersal, Campaign for Justice, and Kevin J. Kolosky; *Petitioners*;

Verna Kelly was, in her official capacity, Chairperson of the Minnesota Board of Judicial Standards, and has been succeeded by Suzanne White, present Chairperson of the Minnesota Board of Judicial Standards; Edward J. Cleary, in his official capacity as Director of the Minnesota Office of Lawyers Professional Responsibility; Charles E. Lundberg, in his official capacity as Chair of the Minnesota Lawyers Professional Responsibility Board; *Respondents*.

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement remains unchanged. *See Petition for a Writ of Certiorari* at ii.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The decision of the court of appeals denying petitions for rehearing and rehearing en banc, Appendix to *Petition for Writ of Certiorari* (" P. App.") 130a, is not yet reported. The opinion of the court of appeals, P. App. 1a-93a, is reported at 247 F.3d 854. The opinion of the district court, P. App. 94a-129a, is reported at 63 F. Supp. 2d 967.

JURISDICTION

The judgment of the United States Court of Appeals for the Eight Circuit was entered on April 30, 2001. P. App. 7a. Motions for Rehearing and Rehearing En Banc were denied on June 26, 2001. P. App. 130a. A Petition for Writ of Certiorari was filed on September 24, 2001, and Question One of the Petition was accepted for review on December 3, 2001. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL & REGULATORY PROVISIONS

The First and Fourteenth Amendments to the United States Constitution and 42 United States Code § 1983 are printed at pages 1-2 of the *Petition for a Writ of Certiorari*. Canon 5 of the Minnesota Code of Judicial Conduct is printed in the Appendix to said *Petition* at 131a-135a.

STATEMENT OF THE CASE

This is a suit challenging Minnesota's Code of Judicial Conduct's Canon 5A(3)(d)(i) - the "announce clause" - which absolutely bars judicial candidates from

announcing their views on disputed legal or political issues during judicial campaigns. The suit claims that the clause unconstitutionally restricts the rights to freedom of speech guaranteed in the First and Fourteenth Amendments to the U.S. Constitution.

Article VI, § 7, of the Minnesota Constitution requires that all judges stand for election every six years. The Justices of the Minnesota Supreme Court adopted a Code of Judicial Conduct ("Code") that governs the conduct of Minnesota's judges, including Canon 5, which governs candidate conduct during judicial elections. Canon 5A(3)(d)(i) prohibits a judicial candidate from, in relevant part, "announc[ing] his or her views on disputed legal or political issues" during judicial campaigns ("Announce Clause"). P. App. at 133a-134a. Additional Minnesota canons also restrict the conduct of the judicial candidate's family and others subject to the candidate's influence: (1) Canon 5A(3)(a) provides that the judicial candidate "shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate" (P. App. at 133a); (2) Canon 5A(3)(b) provides that the judicial candidate "shall discourage other employees and officials subject to the judicial candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing [under the Code]" (P. App. at 133a); and (3) Canon 5B(3)(c) prohibits judicial candidates to "knowingly permit any other person to do for the candidate what the candidate is prohibited from doing [under the Code]." P. App. at 133a.

Finally, judicial challengers are also subject to the

restrictions contained in Canon 5 through incorporation into the Minnesota Rules of Professional Conduct. Article VI, § 5, of the Minnesota Constitution requires that all judges be "learned in the law" – i.e., all judges and judicial candidates must be admitted to practice before the Minnesota courts. *Sylvestre v. State*, 214 N.W.2d 658 (Minn. 1978). The Minnesota Supreme Court has adopted the Minnesota Rules of Professional Conduct, which govern the conduct of attorneys admitted to practice before Minnesota courts. Rule 8.2 (b) of the Rules provides that "a lawyer who is a candidate for judicial office shall comply with the applicable provisions of the [Code]." Therefore, judicial challengers are subject to sanctions under the Rules of Professional Conduct if they violate Canon 5 during a judicial campaign.

1. *Parties.* Petitioner Gregory Wersal is 46 years old, graduated summa cum laude from St. John's University in Collegeville, Minnesota and cum laude from the University of Minnesota Law School in 1980 and was admitted to practice law before Minnesota state courts in 1980. Joint Appendix ("J.A.") at 3, 36. In 1998, Petitioner Wersal campaigned for election to an associate justice seat on the Minnesota Supreme Court and formed his campaign committee, the Campaign for Justice. J.A. at 5. As an attorney admitted to practice law in Minnesota Wersal was subject to professional sanctions if he violated Canon 5. During his 1998 campaign, Wersal did not announce to Minnesota voters his general views on disputed legal or political issues because of his fear that he would be subject to sanctions for violating the Announce Clause. J.A. at 9-

10.

The Republican Party of Minnesota ("RPM") and its related affiliated organizations – Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, and the Minnesota African-American Republican Council are – private associations. The primary purpose of these associations is to elect to public office RPM endorsed candidates with the intent of promoting government policy. More specifically, RPM seeks to endorse candidates to judicial offices in Minnesota with the intent of promoting administrative and judicial policies of the judicial branch. In order to promote its policies through the endorsement of judicial candidates, RPM must hear the general views of those prospective candidates on disputed legal or political issues. J.A. 294, 298-306. However, as a result of the Announce Clause, RPM has been unable to learn such views from the candidate or her close supporters. J.A. 294, 298-306.

Petitioner Cheryl Wersal is the wife of Petitioner Greg Wersal. Petitioner Mark Wersal is the brother of Greg Wersal and a member of his campaign committee. Mark Wersal is also an attorney admitted to practice law in Minnesota and a partner with Greg Wersal in a private law practice. Both Cheryl Wersal and Mark Wersal supported Greg Wersal's candidacy to the Minnesota Supreme Court and both wished to announce to Minnesota voters their knowledge of Greg Wersal's general views on disputed political and legal issues. However, because Canons 5A(3)(a), (b) and (c) subject judicial candidates to sanctions based on the conduct of

their supporters, both Mark Wersal and Cheryl Wersal refrained from announcing their knowledge of Greg Wersal's general views on disputed legal or political issues, due to their concern it would subject Wersal to sanctions from Respondent, the Minnesota Office of Lawyers Professional Responsibility ("OLPR"). Cheryl Wersal Affidavit, District Court Docket #83 at 4; Mark Wersal Affidavit, District Court Docket #85 at 4.

Corwin Hulbert is a 40 year old Minnesota citizen who supported Greg Wersal's candidacy to the Minnesota Supreme Court. Corwin Hulbert wished to announce to Minnesota voters his knowledge of Greg Wersal's general views on disputed political or legal issues. However, because Canons 5A(3)(a), (b) and (c) subject judicial candidates to sanctions based on the conduct of their supporters, Corwin Hulbert refrained from announcing his knowledge of Greg Wersal's general views on disputed political or legal issues due to his concern that such an announcement would subject Wersal to sanctions by the OLPR and thus harm Wersal's candidacy. Corwin Hulbert Affidavit, District Court Docket #56 at 2, 4, 9.

Michael Maxim is a Minnesota citizen and a member of the RPM. He attended the 1998 RPM state convention as a delegate. During the 1998 RPM state convention, Maxim made a motion to endorse judicial candidates. Unlike Cheryl and Mark Wersal and Corwin Hulbert, Michael Maxim did not know Greg Wersal or his campaign committee and did not have sufficient first-hand knowledge of Greg Wersal's general views on disputed legal or political issues. This was also true of most of the delegates to the 1998 RPM

state convention. Michael Maxim wished to hear someone, and particularly Greg Wersal, announce Wersal's general views on disputed political or legal issues as part of the motion to endorse. However, because of the Announce Clause, neither Michael Maxim nor any of the other RPM convention delegates was able to learn Wersal's views from Wersal or any of his close supporters. Declaration of Michael Maxim, District Court Docket #72 at 1-3.

The Minnesota Board on Judicial Standards ("BOJS") was created to enforce disciplinary standards for judges, including the Canons contained in the Code. Minn. Stat. § 490.15-.16. If a Minnesota judge violates any of the Canons, the BOJS is authorized to make recommendations to the Supreme Court that the judge be sanctioned. Minn. Stat. § 490.16 subd. 3. (Only the Minnesota Supreme Court can sanction a judge.) Sanctions include, but are not limited to, removal from judicial office. Minn. Stat. § 490.16 subd. 3.

The OLPR was created to enforce the Minnesota Rules of Professional Conduct. The OLPR receives and investigates ethical complaints against attorneys involving violations of Canon 5 and conducts hearings and issues dispositions on those complaints. *See* Minnesota Rules on Lawyers Professional Responsibility, Rule 12. Sanctions can include, but are not limited to, suspension from the practice of law.

2. *Background.* In 1996, Wersal launched a campaign for the office of Associate Justice of the Minnesota Supreme Court. J.A. at 3-4. During the 1996 campaign, Wersal, members of his campaign committee, his wife Cheryl Wersal, his brother Mark Wersal, Corwin Hulbert, and other members of the RPM and its affiliated associations announced that Wersal was in favor of strict construction of the Constitution. J.A. at 34, Mark Wersal Affidavit, District Court Docket #13 at 4; Cheryl Wersal Affidavit, District Court Docket #11 at 1; Corwin Hulbert Affidavit, District Court Docket #12 at 1-2; and Anthony Sutton Affidavit, District Court Docket #8 at 1-2.

Wersal also distributed campaign literature critical of two Minnesota Supreme Court decisions: (1) *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), in which the Minnesota Supreme Court held that the Minnesota Legislature's refusal to provide welfare medical benefits for abortions violated a women's right to an abortion, and (2) *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), in which the Minnesota Supreme Court held that the Minnesota Constitution required that Minnesota prosecutors tape record confessions in order for those confessions to be admitted into evidence. J.A. 37-38. Wersal's campaign literature criticized the majority opinion in *Doe* for the same reasons as set forth in *Doe's* dissenting opinion. J.A. at 38.

As a result of Wersal's campaigning at RPM meetings, an ethical complaint was filed against Wersal with the OLPR on May 22, 1996. In addition to other complaints, the anonymous complaint charged that Wersal's campaign literature, signed by Petitioner Mark Wersal, stating that "Wersal believes we need judges who will strictly construe the Constitution and who will not legislate from the bench," as well as statements critical of three Minnesota Supreme Court deci-

sions, violated the Announce Clause. J.A. at 12-15, 19.

After completing its initial investigation of the ethical complaint made against Wersal, the OLPR dismissed the complaint. J.A. at 16-23. With respect to the Announce Clause, the OLPR specifically expressed its doubts regarding whether the Announce Clause violated the First Amendment's free speech guarantee. J.A. at 19-21. Although Wersal also believed that the allegations against him either did not violate Canon 5 or were unconstitutional, he was unwilling to put his legal license at risk of further complaints - Which one individual specifically told Wersal he would do despite the fact that the OLPR had dismissed the earlier complaint. J.A. at 46-48. As a result of the ethical complaint, Wersal withdrew his candidacy for a seat to the Minnesota Supreme Court. J.A. at 4-5.

In January, 1997, Wersal announced that he would again be a candidate for Associate Justice to the Minnesota Supreme Court in the November 1998 general election. J.A. at 5. As a result of the ethical complaint made during the 1996 campaign, neither Wersal nor his wife, his brother and other supporters announced Wersal's general views on disputed legal and political issues. J.A. at 9-10, 112-115.

On February 9, 1998, Wersal requested an advisory opinion from the OLPR, inquiring whether the OLPR intended to enforce, among other things, the Announce Clause in conjunction with Wersal's 1998 judicial campaign. J.A. at 10. OLPR responded, stating, with respect to the Announce Clause, that it "continues to have significant doubts as to whether or not

this provision would survive a facial challenge to its constitutionality under the First Amendment to the United States Constitution." J.A. at 32. However, the OLPR specifically refused to state that it would not enforce the Announce Clause. The OLPR would simply continue to choose at this time to exercise its prosecutorial discretion and not prosecute Wersal for a violation of the Announce Clause. J.A. at 32. As a result, during Wersal's 1998 judicial campaign, Wersal did not announce his general views on disputed legal or political issues and he instructed his family members, including his wife Cheryl Wersal, and Mark Wersal, as well as his supporters, such as Corwin Hulbert, to also not announce Wersal's general views on disputed legal or political issues. J.A. at 9-10, 112-115; Cheryl Wersal Affidavit, District Court Docket #83 at 4; Mark Wersal Affidavit, District Court Docket #85 at 4.

Not only did Wersal want to announce his general views on certain disputed legal or political issues to the Minnesota electorate, the RPM wanted to hear Wersal's views to determine whether to endorse his candidacy. J.A. at 294, 296-298. The RPM's delegates could not intelligently evaluate endorsing Wersal's judicial candidacy without knowing Wersal's general views on disputed political or legal issues. J.A. at 297-298. The RPM and its delegates were concerned that in absence of knowledge of Wersal's views, the RPM could not properly endorse Wersal. J.A. 293-294, 297-298. However, Canon 5 prevented Wersal and his closest supporters from announcing Wersal's views. J.A. at 9-10, 112-115; Cheryl Wersal Affidavit, District Court Docket #83 at 4; Mark Wersal Affidavit, District

Court Docket #85 at 4.

In addition, because of the ethical complaints filed against Wersal in conjunction with his 1996 campaign, RPM officials were concerned with the potential political damage not only to Wersal, but also to the RPM and its other political candidates, if the OLPR or Minnesota Supreme Court sanctioned Wersal. J.A. 47, 292, 304-305. Therefore, if the RPM decided to move forward with an endorsement in 1998, it would have to do so without access to any expression of Wersal's general views by the candidate or those associated with him and at some political risk.[1] Nonetheless, at the June 1998 RPM State Convention, delegate Michael Maxim made a motion to that the RPM endorse Wersal to the Supreme Court. The endorsement motion failed by a narrow margin of 344 to 390 votes. J.A. at 297, Declaration of Michael Maxim, District Court Docket #72 at 2.

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[1] The concerns of the RPM and Wersal were well founded. In the 1992 elections, Minnesota attorney Michael DeMoss ran for the seat of Chief Justice of the Minnesota Supreme Court. Affidavit of J.A. at 254-256. During his campaign, DeMoss stated "the unborn child is a human being, has constitutional rights, and the State of Minnesota needs to protect those rights." J.A. at 260. After learning of DeMoss' statements, the BOJS filed an ethical complaint with the OLPR against DeMoss. State newspapers immediately reported that the BOJS had filed a ethical complaint against DeMoss that derailed DeMoss' campaign. J.A. 254-255. The OLPR finally determined that discipline was not warranted and dismissed the complaint as a matter of prosecutorial discretion – but only well after the November 1992 election. J.A. at 255. The damage to DeMoss' campaign had been done.

3. *Procedural History*. On February 27, 1998, Petitioners filed suit under 42 U.S.C. §1983 requesting declaratory and injunctive relief against various provisions of Canon 5, including the Announce Clause, in the U.S. District Court for the District of Minnesota. While expressing doubts regarding the constitutionality of the Announce Clause, the district court denied Petitioners' Motion for a Preliminary Injunction. *Republican Party of Minnesota v. Kelly*, 996 F. Supp. 875, 879 (D. Minn. 1998). Wersal and the RPM appealed to the U.S. Court of Appeals for the Eighth Circuit and filed emergency motions for injunctive relief in both the Eighth Circuit and this Court. Both motions were denied. On October 28, 1998, in a 2-1 per curiam opinion, the Eighth Circuit affirmed the district court Order. *Republican Party of Minnesota v. Kelly*, 163 F.3d 602 (8th Cir. 1998).

Upon remand, on March 12, 1999, both Petitioners and the State filed cross motions for summary judgment. On September 14, 1999, the district court denied Petitioners' and granted the State's Motion for Summary Judgment, after applying a narrowing construction to the Announce Clause to save it from constitutional attack. *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967, 983-986 (D. Minn. 1999); P. App. 123a-129a.

Petitioners appealed to the Eighth Circuit on October 12, 1999. The Eighth Circuit heard oral arguments, on May 10, 2000, on an expedited schedule. On April 30, 2001, the Eighth Circuit, in a 2-1 opinion, affirmed the district court's Order. *Republican Party of Minnesota v. Kelly*, 247 F.3d. 854 (8th Cir. 2001); P. App. 1a-

93a. Among other things, the Eighth Circuit accepted the district court's construction of the Announce Clause to forbid judicial candidates from announcing their views on disputed legal or political issues only with regard to matters likely to come before a court, then upheld the clause under the First Amendment. P. App. 43a-52a.

In dissent, Judge Arlen Beam rejected the construction adopted by the district court, because "it does not, in fact, effectively limit the prohibitive scope of the clause, so that the clause continues to roam far beyond the narrow category of speech left unprotected" under the First Amendment. P. App. 77a. The Eighth Circuit denied Petitioners' Motions for rehearing and en banc reconsideration, on a 6-3 vote, on July 19, 2001. Petitioners filed their *Petition for Writ of Certiorari* on September 24, 2001, and this Court accepted review of Question 1 on December 3, 2001.

SUMMARY OF ARGUMENT

Petitioners filed this action alleging that the Announce Clause, Minnesota Code of Judicial Conduct, Canon 5A(3)(d)(i), Pet. App. 134a, unconstitutionally restricts their rights to freedom of speech as guaranteed in the First and Fourteenth Amendments to the U.S. Constitution. The State argues that the Announce Clause is narrowly tailored to serve its compelling state interest of preserving the independence and impartiality of the Minnesota judiciary. Petitioners' counter that the Announce Clause is not narrowly tailored to serve the State's alleged compelling interest.

First, Minnesota's elective judicial selection process requires that all Minnesota judges stand for competitive elections every six years. Minn. Const. art. VI, §§ 7 and 8. Moreover, judges appointed to the bench by the governor to fill a vacancy must stand for election in the next general election more than one year after their appointment in order that the judge has sufficient time to develop a record for the voters to evaluate. The Announce Clause, which provides that no candidate for judicial office may "announce his or her views on disputed legal or political issues," completely circumvents the purpose and structure of the Minnesota elective judicial system - Holding Minnesota judges accountable to the electorate every six years in open, competitive elections.

Second, the history of judicial elections in the United States reveals that dating from the early 19th century, States began amending their constitutions to change from an appointed judiciary to an elected judiciary to provide for judicial accountability because of the widespread perception that appointed judges only served the interests of male property owners who held the exclusive franchise (and thereby controlled judicial appointments). By the time of the Civil War, 24 of 34 States had established elected judiciaries. As new States were admitted to the Union after the Civil War, every State adopted popular election of some or all judges until the admission of Alaska in 1959. To this day, 33 states use popular elections to select or retain some or all of their judges.

Likewise, Minnesota's 1857 Constitutional Debates reflected the Union's preference to subject judicial officers to elections in order to maintain this "elective

check" over the judicial branch:

> I say than that in order to correct the errors of Judges – and it may be important to correct them – the office should be made elected. The community is capable of judging in these matters, and, if a judicial decision is correct, the judicial officer will be sustained. . . .

Proceedings and Debates of the [1857] Minnesota Constitutional Convention (Democratic) 503. (Lafayette Emmett, first Chief Justice of Minnesota, speaking)

Minnesota has retained its elective judicial system since 1857, even in the face of several opportunities and efforts to modify or abolish it in preference of appointive selection or retention models.

Finally, Minnesota's judges, through their common lawmaking and constitutional interpretive authority, exercise great power to make law in Minnesota. Minnesota's constitutional requirement that judges stand for election reflects the basic democratic principal underlying self government - the citizens are sovereign and should only be subject to laws to which they have consented. Subjecting judges to elections provides Minnesota citizens with the ability to provide "consent" to judicial common lawmaking.

The Announce Clause, by restricting information provided to the voters in a judicial elections, contradicts the very purpose for which Minnesota originally established and continues to retain an elected judiciary - to hold judges accountable for their decisions in office and exercise consent to judicial common lawmaking.

Third, the ABA, which first developed the Announce Clause as part of its Model Code of Judicial Conduct, has since abandoned the Announce Clause due to its belief that the Clause is unconstitutional. Despite the fact that the OLPR, the BOJS and Minnesota Supreme Court's own Advisory committee have all expressed similar concerns that the Announce Clause is unconstitutional, the Minnesota Supreme Court has refused to abandon the Announce Clause in Minnesota.

Fourth, the Announce Clause violates core First Amendment principals. Primarily, it constitutes an absolute ban on content based speech in the midst of an election campaign for public office. *Brown v. Hartlage*, 456 U.S. 45, 53 – 54 (1982). With respect to incumbent judges, the Announce Clause prevents incumbent judges from responding to attacks based on the incumbent's record. However, while incumbent judges can still "announce" their views on disputed legal issues to the electorate through the issuance of published opinions, the Announce Clause prevents judicial challengers from similarly "announcing" to the electorate their views on those very same issues - Even to the point of not allowing challengers to "announce" that they agreed with either the majority or dissenting opinion.

However, the most critical First Amendment issue at stake in this case is not the judicial candidate's right to speak, but rather the public's right to hear the candidates' views from the candidates' themselves in order to intelligently hold judges accountable during the elections. While the State makes the argument - completely at odds with the principles underlying self government - that the public's knowledge of the candi-

date's views will result in the public electing a biased and partial judiciary, the State presents no facts to support this argument. In fact, numerous facts demonstrate that Minnesota's citizens desire an impartial judiciary every bit as much as the State. Minnesota's citizens have provided for a judicial system of overlapping procedures to ensure due process. It is in the citizens' own self interest to have an impartial judiciary in the event they are ever a party in court. Finally, other states which have voted incumbent judges out of office have done so because the incumbent was viewed as biased. Minnesota's citizens undeniably desire an impartial judiciary and have provided for judicial elections to ensure Minnesota has an impartial judiciary.

Fifth, the State, the District Court, and the Eighth Circuit have all proposed different glosses on the Announce Clause. However, the interpretations they offered do not substantially limit the scope of the clause and cannot be justified by the plain language or context of the clause. As a result, the Announce Clause is unconstitutionally vague.

Finally, by cross reference to the Brief of co-Petitioner's RPM, et al, Petitioner Wersal and his campaign committee also argue that no compelling state interest justifies the Announce Clause and that the Announce Clause is not narrowly tailored to satisfy any compelling state interest.

ARGUMENT

I. The Integrity Of The Minnesota Elective Judicial Selection Process Requires That Judicial Candidates Be Allowed To Express – And Voters Be Allowed To Hear – The Candidates' General Views On Disputed Legal Or Political Issues.

A. The Structure Of The Minnesota Judicial Selection Process Assumes That Judicial Candidates May Express – And Voters May Hear – The Candidates' General Views On Disputed Legal Or Political Issues.

The Minnesota Constitution mandates the election of judges to all judicial offices in Minnesota – including the Supreme Court – and specifies that the term of office of all judges shall be six years. Minn. Const. art VI, § 7. Although the Minnesota Constitution empowers the governor to fill any judicial vacancies by the power of appointment, Minn. Const. Art. VI, § 8 mandates that judges appointed to the bench must stand for election at the next general election more than one year after their appointment. Thus, Minnesota has open judicial elections involving candidates competing for the judicial seat – not retention elections. This competitive and adversarial structure assumes that judicial candidates will stand and engage in a vigorous public debate providing information to the electorate.

Moreover, the six year term limit provides voters the opportunity to periodically evaluate the judge's performance in office. Similarly, Minnesota amended Minn. Const. Art. VI in 1972, changing the period of

time in which a judge initially appointed by the Governor must stand for election from not less than 30 days after appointment to not less than one year nor more than two years after appointment. Minn. Const. Art. VI, § 8. The Minnesota Supreme Court found that the reason for this amendment was to ensure that the appointed judges would have sufficient time on the bench to have developed a record of judicial decisions which the electorate can evaluate in determining whether to elect the judge to a full six year term. *Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992).

The Announce Clause is antithetical to the purpose underlying Minnesota's constitutional structure that limits judicial tenure and requires judicial elections. The Announce Clause denies voters the information they need to intelligently exercise their franchise. Moreover, it proscribes effective discussion of an incumbent judge's record, which is completely at odds with limiting the term of the judicial office in order that the voters can review the judge's judicial performance.

B. The History of Judicial Elections Demonstrates That Voters Intended To Have Access to the Judicial Candidates' General Views On Disputed Legal Or Political Issues.

1. The Appropriate Selection System for Judges Is A Disputed Issue Throughout Our Nation's History.

The mechanism for selecting and retaining judges has been much debated throughout American history.

During the colonial era, the English King selected colonial judges who served at the Crown's pleasure. Not surprisingly, the Crown constantly abused its control over the colonial judiciary, primarily by removing judges who made decisions the Crown did not like.[2] The Colonists ultimately viewed the colonial courts and judges not as independent arbiters of cases or controversies, but rather as mere extensions of the Crown's power – a significant factor in the Colonists declaring independence in 1776.[3] As a result of this experience, the Founding Fathers structured the federal judiciary as an independent third branch of government providing for the appointment of judges with lifetime tenure, subject only to removal by impeachment. Larry C. Berkson, *Judicial Selection in the United States, A Special Report*, 64 Judicature 176 (1980) ("*Special Report*").

Similarly, the original 13 States provided for appointment of judges – either by the governor, legislature, or an executive council – with all but New Jersey

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[2] The Crown's absolute power of appointment and removal of judges, and the Crown's abuse of this power for short term political gain, played a significant factor in the Glorious Revolution of 1688 and the downfall of the Stuart Kings, and it continued well into the American Revolutionary War. Evan Haynes, *Selection and Tenure of Judges* 51-79 (1944) ("*Selection and Tenure*"); Harry Stumpf, *American Judicial Politics* 133 (2nd ed. 1998).

[3] The Declaration of Independence lists as one of the reasons for declaring independence that the King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

and Pennsylvania providing judges with lifetime tenure or tenure conditioned on good behavior. *Id.; see also Selection and Tenure* at 101-135. Almost immediately, however, the judicial appointment and tenure system came under severe attack. Citizens resented the fact that property owners, through their exclusive control of the franchise, selected all government officers, including judges.[4] Resentment over the lack of universal suffrage ultimately culminated in the historical movement now known as Jacksonian Democracy[5] – which, among other things, fostered the popular election of judges.

Beginning in 1812, Georgia amended its constitution to provide that judges of inferior courts would be popularly elected as opposed to appointed. Other States soon followed, either joining the Union with or amend-

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[4] When the Republic was founded, the franchise resided almost exclusively with property owners who controlled the legislature and executive – and thus judicial appointments. The experience of the non-franchised, non-property owning citizens with the judiciary was primarily limited to appearing before judges appointed by the franchised-property owning citizens to enforce their debts – a situation that only fostered resentment. *Selection and Tenure* at 85-91.

[5] The political concept underlying the Jacksonian movement was popular sovereignty. The most visible result of the Jacksonian Democracy movement was the extension of the franchise to all males regardless of whether they owned property and the abolition of judicial appointments in favor of judicial elections. By 1820, even Thomas Jefferson was advocating the popular election of judges. *Selection and Tenure* at 93-95.

ing their existing constitutions to provide for judicial elections.[6] By the time of the Civil War, 24 of 34 States had established elected judiciaries. Every State admitted to the Union after the Civil War adopted popular election of some or all judges until the admission of Alaska in 1959. *Selection and Tenure* at 99-101; *Special Report* at 176.

To this day, the vast majority of states continue to use some form of election in choosing and retaining judges. 35 states require open competitive elections in some form to select or retain some or all of their judges.[7] Partisan elections are held to select all or

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[6] New York amended its Constitution changing from an appointed judiciary to an elected judiciary at the New York Constitutional Convention of 1846. The benefits of the change were so self evident that one writer at the time commented: "The debates on an elective judiciary were brief; there was apparently little need to discuss the use of the appointive system, or its failures, or why election would be better." *Special Report* at 176.

[7] Twenty states require almost entirely elective judicial systems. Ark. Const. art. 7, §§ 6, 17; Idaho Const. art. VI, § 7; Ill. Const. art. VI, § 12; Ky. Const. § 117; La. Const. art. V, § 22; Mich. Const. art. VI, §§ 2, 8, 12; Minn. Const art. 6, § 7 & Minn. Stat. § 480B.01 (2001); Miss. Const. art. 6, § 145; Nev. Const. art. 6, §§ 3, 5; N.M. Const. art. VI, § 33; N.C. Const. art. IV, §§ 9-10, 16; N.D. Const. art. 6, §§ 7, 9; Ohio Const. art. IV, § 6; Okla. Const. art. VII, § 3; Or. Const. art. VII, § 1; Pa. Const. art. 5, § 13; Tex. Const. art. V, §§ 2, 7; Wash. Const. art. IV, §§ 3, 5; W. Va. Const. art. VIII, §§ 2, 5; Wis. Const. art. VII, § 9.

Fifteen states select their judiciaries in hybrid manners, utilizing both elective and appointive methods. Ala. Const. art. VI, §§

some judges in 16 of these 35 states.[8] Nonpartisan open and competitive elections are held to select some or all of the judicial offices in 19 additional states.[9] Moreover, six states conduct some form of retention election for all of their judges - i.e., judges are appointed, sit for a fixed term at the end of which voters are simply asked whether the judge should be retained

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152-153; Ariz. Const. art. 6, §§ 37-42; Cal. Const. art. VI, § 16; Fla. Const. art. V § 10, 11; Ga. Const. art. VI, § VII, para. I; Ind. Const. art. 7, §§ 7, 10-11; Kan. Const. art. 3, § 6; Me. Const. art. 5, pt. 1 § 8 & art. 6, § 6; Md. Const. art. IV, § 3-4; Mo. Const. art. 5, § 25 (a), 25 (c); Mont. Const. art. VII, § 8; N.Y. Const. art. VI, §§ 2, 6, 9; S.D. Const. art. V, § 7; Tenn. Const. art. VI, §§ 3-4; Vt. Const. §§ 32, 51-52.

[8] Ala. Const. amend. 328, § 6.13; Ill. Const. art. VI, § 12; Ind. Const. art. 7, § 7; Kan. Const. art. 3, § 6; La. Const. art. V, § 22; Mich. Const. art. VI, §§ 2, 8 and 12; Mo. Const. art. 5, § 25; N.M. Const. art. VI, § 33; N.Y. Const. art. 6, § 6; N.C Const. art. IV, §§ 9, 10, 16; Ohio Const. art. 4, § 6; Penn. Const. art. V, §§ 13; S. D. Const. Art. V, § 7; Tenn. Const. art. VI, § 3 and 4; Tex. Const. art. V, §§ 2 and 7; W. Va. Const. art. VIII, §§ 8-2 and 8-5.

[9] Ariz. Const. art. 6, §§ 37-42; Ark. Const. art. 7; Cal. Const. art. VI, § 16; Fla. Const. art. 5, Section 10; Ga. Const. art. VI, Section VII.; Idaho Const. art. VI, Section 7; Ky. Const., § 117; Me. Const. art. 6, § 6 & art. 5, pt. 1, § 8; Md. Const. art. IV, § 3; Minn. Const. art VI; Miss. Cont. art. 6, § 149; Mont. Const. art. VII, § 8; Nev. Const. art. VI, § 3 and 5; N. D. Const. art. VI, § 7, 9; Okla. Const. art. VII, § 3; Ore. Const. art. VII, § 1; Vt. Const. §§ 32, 50-51; Wash. Const. art. IV, § 3; Wis. Const. art. VII, § 9.

in office.[10]

Furthermore, six states limit the term of all judicial positions to a fixed number of years and only allow for re-appointment subject to some form of legislative or commission approval.[11]

Finally, only three states - Massachusetts, New Hampshire and Rhode Island - provide for judicial service during good behavior of either lifetime appointment or appointment to age 70.[12]

Thus, the concept of judicial elections is not only consistent with the American system of justice, but it is actually utilized by the majority of states as a mechanism for either selection and/or retention of judges.[13]

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[10] Alaska Const. art. IV, § 6; Colo. Const. art. VI, § 25; Iowa Const. art. V, § 17; Neb. Const. art. 5, § CV-21(3); Utah Const. Art. 8, § 9; Wy. Const. Art. 5, § 4.

[11] Conn. Const. art. 5, § 25; Del. Const. art. IV, § 3; Haw. Const. art. VI, § 3; N. J. Const. art. VI, § VI; S. C. Const. art. V, § 7; Va. Const. art. VI, § 7.

[12] Mass. Const. Chap. III; N. H. Const. art. 73; R.I. Const. art. X, § 4, 5.

[13] It is estimated that 87% of state appellate court and 87% of state trial court judges stand for some form of election. Roy A. Schotland, *Comment*, 61 Law & Contemp. Probs. 149, 154-55 (1998).

2. The People Of Minnesota Have Consistently And Repeatedly Preferred An Elective Judicial Selection Process In Order To Maintain Public Accountability Over The Judiciary.

The then recent U.S. Supreme Court decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), played an important part in the debate on nature of Minnesota's judicial system and selection process at the State's founding Constitutional Convention in 1857. Delegates arguing in favor of an unelected judiciary supported *Dred Scott* and were eager to insulate judges from any majoritarian pressures at the ballot box in what was to be a heavily abolitionist State. *Proceedings and Debates of the [1857] Minnesota Constitutional Convention (Democratic)* at 495-496. Responding to these arguments, LaFayette Emmett, who would go on to become the first Chief Justice of the Minnesota Supreme Court, argued that Minnesota needed an elected judiciary in order to maintain an "elective check" on the judiciary:

> We hear a great deal of talk about an independent judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people? . . . I say than that in order to correct the errors of Judges – and it may be important to correct them – the office should be made elected. The community is capable of judging in these matters, and, if a judicial decision is correct, the judicial officer will be sustained. . . . Sir, if the people are incapable of selecting their judges, they are also incapable of selecting [the governor] who is to appoint the

> Judges. The governor always selects men belonging to his own political party, while the people often elect them regardless of party.

Proceedings and Debates of the [1857] Minnesota Constitutional Convention (Democratic) 503.

Those arguing in favor of judicial elections won the day: the 1857 Minnesota Constitutional Convention adopted a Constitution specifically providing for judicial elections. Minn. Const. of 1857, Art. VI, §§ 3 and 4. Over the course of the next 145 years, Minnesota has repeatedly refused to abolish judicial elections despite several opportunities and efforts to do so.[14] Minnesota's

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[14] In 1883, Minnesota amended its Constitution to reduce the term of office for judicial candidates from seven to six years. Amendment to Art. 6, § 3, proposed by 1883 Gen. Laws and adopted at the general election of 1883: 1885 Gen. Laws at 2. In 1948, a special constitutional convention recommended wholesale revisions to the judicial article of the Constitution, including a comprehensive scheme for elections when an incumbent is seeking reelection. *See Report of the Constitutional Commission of Minnesota* 42-45 (1948). In 1956, Article VI of the Minnesota Constitution was once again amended. However, Minnesota's citizens retained judici al elections. Minn. Const. of 1956, Art. VI, §§ 8, 10, and 12. Finally, in 1972, a newly convened constitutional study commission recommended that Minnesota adopt the "Missouri retention system," a recommendation that was not adopted. *See* Judicial Branch Committee Report, *Minnesota Constitutional Study Commission* 24-25 (1972). However, as a result of the committee's recommendation, Minnesota did amend its Constitution to provide that judges stand for election at the next general election more than one year after their appointment as opposed to the then current provision requiring appointed judges stand for election at the next general election more than 30 days after

founding citizens provided for judicial elections for the express purpose of "correct[ing] the errors of Judges," and subsequent generations have considered, but refused, to relinquish this power "retain[ing] ultimate control of the judiciary in the hands of the voting public." *See Peterson v. Stafford,* 490 N.W.2d 418, 422 (Minn. 1992).

3. The Minnesota Courts' Common Law-Making And Interpretive Authority Justify Electoral Judicial Accountability.

As recently as 1998, the Minnesota Supreme Court held "[t]his court has the power to recognize and abolish common law doctrines." *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998) (recognizing the tort of invasion of privacy). The *Lake* Court specifically rejected "the proposition that only the legislature may establish new causes of action." *Id.* at 235. Minnesota courts have adopted numerous legal changes though their development of the common law – a quasi-legislative function.[15] Minnesota courts have also issued several recent controversial decisions striking

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appointment.

[15] *See, e.g., Anderson v. Stream,* 295 N.W.2d 595 (Minn. 1980) (abrogation of the parental immunity doctrine); *Nieting v. Blondell,* 235 N.W.2d 597 (Minn. 1975) (abolished the doctrine of soveriengn immunity); *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983) (recognized the tort of intentional infliction of emotional distress.); *McCormack v. Hankscraft Co.*, 154 N.W.2d 488 (Minn. 1967) (recognized the doctrine of strict liability in product liability cases; *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn.Ct.App. 1988) (recognized the tort of negligent transmission of herpes).

down Minnesota statutes under the Minnesota Constitution that are at odds with the decisions of other state courts and federal courts interpreting similar provisions under their respective constitutions.[16]

Judicial elections are intended to guarantee judicial countability on the exercise of these judicial law-making and interpretive powers. But in order to competently exercise their franchise, "the people themselves must provide themselves with the best possible data from which to determine their own choices." James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Doctrine,* 51 U. Pitt. L. Rev. 189, 192 (1990). The Announce Clause, by silencing judicial candidates, frustrates the very purpose of Minnesota's elective judicial system – a system adopted precisely in order to hold

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[16] See, e.g. *Doe v. Gomez,* 542 N.W.2d 17 (Minn. 1995) (implied right to privacy found under Minnesota's Constitution requires the Minnesota legislature to appropriate money to pay for the abortions of poor women); *State v. Scales,* 518 N.W.2d 587 (Minn. 1994) (Minnesota Constitution required that Minnesota police tape record confessions in order for those confessions to be admitted into evidence); *State v. Russell,* 477 N.W.2d 886 (Minn. 1991) (differences in sentencing for possession of crack as opposed to possession of cocaine violated Minnesota's equal protection clause.) *See also Doe v. Ventura,* Case No. CIV 01-000489 (Hennepin County Dist. Ct. filed May 15, 2001) (court strikes down Minnesota's sodomy statute under the Minnesota Constitution's implied right to privacy despite the fact that Minn. Const. art. I, § 16 authorizes the legislature to regulate "acts of licentiousness" and the Minnesota legislature had revised the sodomy statute as recently as 1977 as Minn. Stat. § 609.293 (1977)).

the judiciary accountable based not only on their resumes, but also based on the views they adopt on legal or political issues through their law-making and interpretive functions.

II. History of The Announce Clause.

A. History of the American Bar Association's Model Code of Judicial Conduct And the Announce Clause.

The American Bar Association adopted its first "Canons on Judicial Ethics" in 1924 ("1924 ABA Canons"). 1924 ABA Canon 30, titled "Candidacy for Office," provided, in relevant part, that the judicial candidate "should not announce *in advance* his *conclusions of law* on disputed issues *to secure class support* . . . ." Lisa L. Milord, *The Development of the ABA Judicial Code* 140-41 (1992) ("*Milord*") (emphases added). In 1972, the ABA withdrew its Canons on Judicial Ethics and adopted the Model Code of Judicial Conduct ("1972 ABA Canons"). Canon 7 to the 1972 ABA Canons, titled "A Judge Should Refrain From Political Activity Inappropriate To His Judicial Office," contained canons governing the conduct of judicial campaigns, including the announce clause at issue here.

In 1990, the ABA amended the 1972 ABA Canons. The 1990 Model Code ("1990 ABA Canons") entirely revised the Code's format, reduced the number of Canons from seven to five, eliminated the "announce clause," and replaced it with a "commitments clause," that forbids judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are

likely to come before the court." *Milord* at 99.

Nine states have incorporated the 1972 announce clause in their respective codes of judicial conduct.[17] Of these nine states, seven, Arizona, Maryland, Minnesota, Mississippi, Missouri, New Mexico, and Pennsylvania, have either an elective judiciary or a hybrid appointive and elective judiciary.[18] The other two, Iowa and Colorado, employ a retention vote in their appointive systems.

Twenty-five states have adopted judicial codes based on the 1990 commitments clause.[19] One state still

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[17] *See* Ariz. Code of Jud. Conduct Canon 5B(1)(d) (2001); Colo. Code of Jud. Conduct Canon 7B(1)(c) (2001); Iowa Code of Jud. Conduct Canon 7B(1)(c) (2001); Md. Code of Jud. Conduct Canon 5B(5) (2001); Minn. Code of Jud. Conduct Canon 5A(3)(d) (2001); Miss. Code of Jud. Conduct Canon 7B(1)(c) (2001); Mo. Code of Jud. Conduct Canon 5B(1)(c) (2001); N.M. Code of Jud. Conduct Canon 21-700B(4) (2000); Pa. Code of Jud. Conduct Canon 7B(1)(c) (2001).

[18] Moreover, a federal court narrowly construed Pennsylvania's announce clause as limited to the 1990 statements clause. *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania,* 944 F.2d 137 (3d Cir. 1991).

[19] *See* Alaska Code of Jud. Conduct Canon 5A(3)(d) (2001); Ark. Code of Jud. Conduct Canon 5A(3)(d) (1997); Cal. Code of Jud. Conduct Canon 5B (2001); Fla. Code of Jud. Conduct Canon 7A(3)(d) (2001); Ga. Code of Jud. Conduct Canon 7B(1)(c) (2001); Ill. Sup. Ct. Rules Rule 67, Canon 7A(3)(d) (2001); Ind. Code of Jud. Conduct Canon 5A(3)(d) (2001); Kan. Sup. Ct. Rules Rule 601A, Code of Jud. Conduct Canon 5A(3)(d) (2001); Ky. Sup. Ct. Rule 4.300, Canon 5B(1)(c) (2001); La. Code of Jud. Conduct Canon 7B(1)(d) (2001); Me. Code of Jud. Conduct Canon 5B(2) (2001); Neb. Code of Jud. Conduct

adheres to the 1924 version.[20] Four states have clauses wholly independent of any of the ABA's modes.[21]

Lastly, eleven states have no Announce Clause or comparable provision.[22]

Canon 5A(3)(d) (2001); Nev. Code of Jud. Conduct Canon 5A(3)(d) (2001); N.Y. Code of Jud. Conduct Canon 5A(4)(d) (2001); N.D. Code of Jud. Conduct Canon 5A(3)(d) (2001); Ohio Code of Jud. Conduct Canon 7(B)(2)(d) (2001); Okla. Code of Jud. Conduct Canon 5A(3)(d) (2001); R.I. Code of Jud. Conduct Canon 5A(3)(d) (2001); S.C. Code of Jud. Conduct Canon 5A(3)(d) (2000); S.D. Stat., ch. 16-2, app., Code of Jud. Conduct Canon 5A(3)(d) (2001); Tenn. Sup. Ct. R. 10, Code of Jud. Conduct Canon 5A(3)(d) (2001); Vt. Code of Jud. Conduct Canon 5B(4) (2000); Wash. Code of Jud. Conduct Canon 7(B)(1)(c) (2001); W. Va. Code of Jud. Conduct Canon 5(A)(3)(d) (2000); Wyo. Code of Jud. Conduct Canon 5A(3)(d) (2000).

[20] *See* Mont. Code of Jud. Conduct Canon 35 § 30 (2001).

[21] *See* Ala. Canons of Jud. Ethics Canon 7B(1)(c) (2001); Tex. Code of Jud. Conduct Canon 5(1)-(2) (2001); Utah Code of Jud. Conduct Canon 5A(2), Canon 5B(4), Canon 5(C)(1) (1999); Wis. Sup. Ct. Rules Rule 60.06(3) (2001).

[22] *See* Conn. Code of Jud. Conduct Canon 7 (2001); Del. Code of Jud. Conduct Canon 7 (2001); Haw. S. Ct. Rules, Exhibit B, Code of Jud. Conduct Canon 5 (1999); Idaho Code of Jud. Conduct Canon 7 (2001); Mass. S. Ct. Rules Rule 3:09, Code of Jud. Conduct Canon 7 (2001); Mich. Code of Jud. Conduct Canon 7 (2001); N.H. S. Ct. Rules Rule 38, Code of Jud. Conduct Canon 5 (2001); N.J. Code of Jud. Conduct Canon 7 (2001); N.C. Code of Jud. Conduct Canon 7 (2001); Or. Code of Jud. Conduct, Jud. Rule 4-102; Va. S. Ct. Rules, Part 6, § III, Canon 5 (2001).

B. The History Of The Announce Clause In Minnesota.

From 1860 to 1972, Minnesota conducted judicial elections without any codes or canons restricting the speech or campaign activities of judicial candidates.[23] In 1972, the Minnesota Supreme Court, without making any factual findings, adopted the "Standards of Professional Responsibility" for judges which for the first time implemented statewide rules governing judicial campaign conduct. Minn. Rules of Court Desk Copy (West 1972).

Two years later, again without making any factual findings, the Minnesota Supreme Court adopted a Code of Judicial Conduct ("Code"), specifically modeled after the 1972 ABA Canons, which contained the Announce Clause at issue here in its Canon 7 . *See* 1974 Minnesota Code of Judicial Conduct, Canon 7.

In 1995, the Minnesota Supreme Court held hearings to determine whether to amend the Code yet again. Prior to these hearings, the Court's own Advisory Committee, as well as the OLPR and the BOJS, specifically requested that the Minnesota Supreme Court strike the Announce Clause from the Code because they believed the provision was unconstitutional. *See* Defendant BOJS' April 4, 1995 Correspondence to Minnesota Supreme Court. Declaration of William F.

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[23] In 1950, the Minnesota District Judges Association adopted the 1924 ABA Canons. However, these did not have the force of law. Moreover, they did not apply to either non-incumbent judicial candidates or Minnesota Appellate Court judges.

Mohrman, District Court Docket #69 at 4-5. In its letter, the BOJS stated that "in view of other states and federal court rulings which address the issue, the outcome [a court striking down the Announce Clause] seems inevitable." *Id.* In addition, the Supreme Court's own Advisory Committee also recommended deleting the Announce Clause:

> replac[ing] the previous blanket prohibition against announcing views on disputed legal or political issues with a prohibition against making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.

See, Final Report of the Advisory Committee to Review the American Bar Association Model Code of Judicial Conduct – June 29, 1994, p. 5. J.A. at 367.

Declining to take the advice of either its own Advisory Committee or the bodies charged with enforcing its Code, the Minnesota Supreme Court retained the Announce Clause in its 1994 amendments to the Code in what became Canon 5. Only three years later, the Minnesota Supreme Court once again amended the Code in 1997; however, the Minnesota Supreme Court left the Announce Clause in force.

III. The Announce Clause Violates Core First Amendment Values.

A. The Announce Clause Severely Restricts Free Speech Rights During Campaigns.

"Congress shall make no law. . . abridging freedom of speech or [freedom of association]. . . " U.S. Const.

Amend. I. The First Amendment applies to the States by virtue of the Due Process Clause of the Fourteenth Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903 n. 43 (1982). "Freedom of speech and the other freedoms encompassed by the First Amendment have always been viewed as fundamental components of the liberty safeguard by the Due Process Clause." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

Most important to this case, "it can hardly be doubted that the constitutional guarantee [to free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Where speech restrictions are "intimately related to the process of governing, the State may prevail only upon a showing a subordinate interest which is compelling . . . and the burden is on the government to show the existence of such an interest." *Bellotti*, 435 U.S. 786 (citing *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

This Court has never allowed the government to proscribe truthful statements about public issues by candidates, and it has struck down laws preventing candidates from making promises, short of offering a bribe, during a campaign that the candidate either cannot keep or did not keep. *Brown v. Hartlage*, 456 U.S. 45, 53 – 54 (1982). Finally, restrictions on speech that result in sanctions to the speaker, such as those contained in the Code, are subject to even greater scrutiny. *In re Primus*, 436 U.S. 412 (1978).

Under these rulings, the Announce Clause violates the First Amendment's guarantees of free speech. First, the announce clause presents an absolute ban on even *truthful* speech by a candidate to public office during an election campaign. Second, "content based [speech] restrictions are presumptively invalid" under the First Amendment. *R.A.V. v. City of St.Paul*, 505 U.S. 377, 382 (1992). The Announce Clause ban on judicial candidates "announcing" their "views on disputed political or legal issues" is a content based speech restriction prohibiting the judicial candidates' views on any matters in dispute. Strict scrutiny is thus required.

1. The Announce Clause Severely Impinges on a Judicial Candidate's First Amendment Rights.

The Announce Clause severely impinges on the judicial candidates' free speech rights. A primary purpose underlying the application of the First Amendment to a campaign for public office is for the candidates to be able to fully and accurately communicate their views to the voters and to respond to campaign criticisms. The Announce Clause not only prevents judicial candidates from communicating to voters why the candidates should be elected, it also prevents candidates from responding to criticism directed at the candidate.

First, the Announce Clause prevents incumbent judge candidates from responding to criticism from third parties, including the media and interest groups, although incumbents inevitably have records at least in the form of written opinions that are targets for criti-

cism. Non-candidate individuals and organizations are not subject to the Announce Clause, and they are free to criticize the incumbent with impunity. The Announce Clause chills the speech of the candidate because, even if the incumbent candidate believed that a response to an opponent's attacks would not violate the clause, the opponent's ability to file an ethical complaint based on a response would have a negative effect on the incumbent's campaign.

Second, while judicial challengers may similarly be handicapped in an election campaign against an incumbent judge if they have substantial legal or political records, judicial challengers face additional problems in mounting a successful campaign against an incumbent judge as a result of the Announce Clause. While incumbent judges may openly announce their views to the electorate on disputed legal or political issues through written opinions and other means that are privileges of office, challengers are forbidden by the Announce Clause to effectively respond in kind to the incumbents' stated positions or the rationales of their opinions during the course of their campaigns.

2. The Announce Clause Impinges On the Rights of the Judicial Candidate's Supporters.

Canon 5 not only severely and directly restricts the speech of the judicial candidates, it also restricts the speech of her supporters through the "wrap around" provisions contained in Minn. Canon 5A(3)(a), (b) and (c). P. App. 133a. Paradoxically, these provisions require a candidate to try to gag family, employees and

other supporters -- in effect, to urge supporters not to support their candidacies by disclosing the candidate's general views on political or legal matters. Those who know the candidate best and who want to support the candidate cannot do so for fear of subjecting the candidate to an ethical violation.

Even if the candidate discourages family, friends, and associates, he still cannot control them. If a supporter fails to comply with the candidate's direction and announces the candidate's views on a particular issue, then an ethical complaint may be filed against the candidate in the middle of the campaign, causing obvious damage to the campaign and the reputation of the candidate. At the very least, the candidate must take time to defend himself against the charges in public and in proceedings that may take months or years beyond the election.[16]

Finally, even if the candidate and his supporters comply with the these Canons, other individuals can distribute campaign literature on the candidate "announcing" the candidate's views. In 1998, this happened to Wersal when several flyers were distributed "announcing" Wersal's views on various issues at the RPM state convention. Wersal was forced during his campaign to deny that he had engaged in this "unethical" conduct. J.A. at 48. Moreover, by vigorously denying that he sent out the flyers to the public in order to protect himself from an ethical claim, Wersal falsely

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[16] See, ethics complaint filed against Wersal in 1996. J.A. at 12-15.

created the impression with the public that he did not agree with the views contained in the flyers -- precisely the opposite result that Wersal would want if the Announce Clause did not restrict his speech. J.A. at 129.

3. The Announce Clause Impinges On Voter's Rights.

As set forth in Minnesota's Constitutional Debates, Minnesota's citizens made the judicial office elective in order to exercise popular control over the judiciary. From this perspective, the most critical First Amendment issue at stake in this case is not the judicial candidate's right to speak, but rather the public's right to hear the candidates' views from the candidates' themselves. The public's right to hear the candidate is a necessary prerequisite to self government. "It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." Alexander Meiklejohn, Free Speech and its Relation to Self-Government 26-27 (1948).

The First Amendment protects not only the rights of those who want to speak, but also the rights of those who want to hear the speaker. *Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("The [First Amendment] protection afforded is to the communication, to its source and to its recipients both."). Moreover, in the context of an election campaign,"[i]t is of particular importance that candidates have the unfettered opportunity to make their general views known so that the electorate may intelligently evaluate the candidates' personal qualities

and their positions on vital public issues before choosing among them on election day." *Buckley v. Valeo,* 424 U.S. 1, 52-53 (1976).

The Announce Clause not only tramples on the rights of willing speakers, but also on the rights of Minnesota voters who would receive their campaign messages. The voters have an obvious interest in receiving information on disputed legal or political issues from judicial candidates, such as Petitioner Wersal, in order to intelligently evaluate the candidates and select who to vote for.

Minnesota citizens established an elected judiciary in order to hold judges accountable to the people in the exercise of their common law-making and interpretive powers. As Minnesota's first Chief Justice, LaFayette Emmet, argued during debate on the constitutional provision establishing an elected judiciary, Minnesota's citizens are completely "capable of judging in these matters, and, if a judicial decision is correct, the judicial officer will be sustained [in office] . . . ."

Proceedings and Debates of the [1857] Minnesota Constitutional Convention (Democratic) 503.

The State's unspoken fear underlying its rationale for the Announce Clause is that the State cannot trust its own citizens. Unless judicial candidates are gagged, the State presumes that Minnesota's voters would each calculate which candidate would be most biased to the voter's preferred outcomes in various litigation scenarios and then vote on this basis. The State also presumes that voters would believe that any elected judge was "in the pocket" of whatever interest groups the voter believed the candidate seemed to cater to in the election. In fact, the State presumes that the voters are so venal and easily corrupted that not even general views on political or legal issues of candidates should be made available to them, arguing that such statements telegraphs by way of "winks and nods" implicit promises to decide particular cases in particular ways that the voter desires.

Of course, no evidence supports of any of the State's patronizing and repugnant presumptions of its own citizens - Because none exists. To the contrary, there is every reason to believe that Minnesota's electorate strongly supports judicial impartiality and will not support judicial candidates who are perceived to lack the will or capacity to impartially judge cases. In fact, Minnesota's citizens voluntarily established a judicial system that is structured throughout to ensure impartiality - Its judiciary is an independent branch of government, it has two levels of appellate review conducted by multiple judges, it requires public trials and the issuance of written public opinions, its procedural rules contain the ability to remove judges based on partiality, etc.

Moreover, citizen self-interest also would prompt the average voter to support judicial impartiality since voters can never know for certain when and if they may be charged with a crime or made a party to a civil lawsuit. Citizens would be loathe to face a prejudiced

judge in such a circumstance.[17]

Furthermore, if judicial candidates express their general views in a manner that discloses a lack of impartiality or which discloses a subsequent lack of impartiality in later opinions issued from the bench, the electorate has a right to this knowledge too so that they can vote *against* such candidates in the present or in future elections.[18]

Finally, Minnesota's and our nation's history undeniably demonstrates that Minnesota's citizens would support nothing less than an impartial judiciary. Nonetheless, even if the State's concern in this case is

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[17] Indeed, an elective system would tend to favor judicial impartiality more than an appointive system in this respect. Average voters are far less likely to believe that they "count on" any judge to rule in their favor than the "insider" elite likely to be involved in judicial selection in an appointive system.

[18] Former California Chief Justice Rose Bird's defeat in a retention election in 1986, garnering only 32% of the vote, is illustrative. In her ten years as Chief Justice, Justice Bird had refused to vote for imposition of the death penalty in every case presented to her, although the federal courts had found California's death penalty constitutional and the voters had adopted the death penalty law by constitutional referendum. Eventually, the electorate concluded that Chief Justice Bird was simply unwilling to apply California's death penalty law impartially or at all, but chose to impose her own anti-death penalty views on California regardless of the state of the law or public policy. *See* Robert S. Thompson, *Judicial Retention Election and Judicial Method: A Retrospective On The California Retention Election of 1986*, 61 So. Cal. L. Rev. 2007, 2036-2054 (1988).

that Minnesota's citizens will misperceive their own interests if judicial candidates are allowed to "announce their views on disputed legal and political issues," the First Amendment commands that the solution to this concern is more speech - Not a gag rule:

> if there be time to expose through discussion the falsehood and fallacies of the 'bad' speech , to avert the evil threatened by the 'bad' speech by the processes of education, the remedy to be applied is more speech, not enforced silence."

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J. Concurring).

B. The Announce Clause Is Unconstitutionally Vague.

The State, the District Court, and the Eighth Circuit have all proposed different glosses on the Announce Clause. *See* Brief of Republican Party of Minnesota at IIIA(1). However, the interpretations offered do not substantially limit the scope of the clause, cannot be justified by the plain language or context of the clause, or create and compound confusion in the language of the clause. *See id.*

The Eighth Circuit asserts that, although the Announce Clause forbids announcing views on disputed legal or political issues, "general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause." P. App. 54a. Yet, as Judge Beam in dissent points out, "stare decisis, nar-

row or strict construction, original intent and substantive due process" are almost certainly "disputed legal issues," that are "likely" to come before a court. P. App. 77a. Allowing that the Announce Clause permits "general discussions of case law" or "judicial philosophy"simply renders the clause incomprehensible and vague.

The limiting constructions of the Announce Clause offered by the courts below, thus, render the clause less likely to give "fair notice to those to whom [it] is directed" what speech is forbidden. *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972). Failure to provide a speaker with fair notice of forbidden speech would in itself render the Announce Clause unconstitutionally vague. But special precision in regulation of speech should be required when the prohibited speech is that of a candidate in the course of an election campaign. The level of imprecision and confusion here clearly places the Announce Clause beyond constitutionally permissible limits.

As Mr. Wersal testified, because of the breadth and lack of specificity of the Announce Clause, the only proper course for a judicial candidate is silence. J.A. 129. *See also Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 226 (7th Cir. 1993). The First Amendment does not countenance the imposition of silence on candidates campaigning for election.

CONCLUSION

On the basis of the foregoing, Petitioners pray this Court to reverse the decision of the United States Court of Appeals for the Eighth Circuit and hold the announce clause of Minnesota Judicial Canon 5A(3)(d)(i) unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

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Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Reply Brief for Petitioners Gregory F. Wersal, et al.

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement remains unchanged. *See Petition for a Writ of Certiorari* at ii.

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. The Announce Clause Has Injured Wersal, His Family and Supporters, and Minnesota Voters.

The State now claims for the first time (Brief and Appendix for Respondents ("R. B.") 35 n.7) that Petitioner judicial candidate Wersal lacks standing to challenge the Announce Clause based on the following excerpt from an August, 1997 letter Wersal wrote to the Republican Party of Minnesota ("RPM"):

> As a practical matter, the Code allows judicial candidates to discuss their judicial philosophy, such as whether they believe in the strict interpretation of the Constitution, and to criticize prior Court decisions. I believe that I am able to effectively get out *a* message without violating even the most restrictive interpretation of the Code.

Joint Appendix ("J. App.") 1:44 (emphasis added). When Wersal wrote this letter, Canon 5 did not prohibit judicial candidates from speaking at political party gatherings as is now prohibited by Canon 5(B)(1)(b), Appendix to Petition for Writ of Certiorari ("P. App.") 134a. But the RPM nevertheless expressed concern that, on account of the Announce Clause, it would become involved in litigation if Wersal spoke to any of its gatherings. Wersal's letter addressed this concern stating that, despite the Announce Clause, he could still effectively communicate "a" message to the Party – even if not "the" specific messages he wanted to

communicate.

Wersal's August 15, 1997 correspondence does not show that Wersal lacks injury as the result of the Announce Clause or could campaign freely within it. To the contrary, the very fact that such a letter was deemed necessary at all demonstrates how the Announce Clause severely chilled and hamstrung Wersal's campaign.[1]

In fact, Wersal specifically testified in his deposition that the Announce Clause impinged the delivery of his campaign message by preventing him from "stat[ing] in detail [his] opinion about the various cases" described in his campaign flier, limiting his "ability to discuss legal issues under the rules other than perhaps to state the facts and the existence of the case and what the Court held or a dissent held . . ." J. App. 1:162-163.[2]

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[1]Exhibit 1 to Wersal's deposition, J. App. 1:235-236, and his testimony regarding it reveal how the Announce Clause forced him to emasculate his campaign message to the point of voter confusion. Exhibit 1, his campaign piece, cites three Minnesota Supreme Court opinions and discusses their facts, holdings, and dissents. The flyers never stated Wersal's opinion on the cases. Wersal testified in deposition that the Announce Clause prevented him from stating his views on the rulings to the voters, although the Justices he was running against openly stated their views in their decisions. J.A. 1:162-63, 167.

[2] The Director of the [Minnesota] Office of Lawyers Professional Responsibility ("OLPR") stated that if Wersal's statements in campaign literature went beyond mere description of cases to the point that they "constitute a statement of his views on crime, welfare or abortion," then these statements would violate the Announce

Although the Minnesota Supreme Court left the Announce Clause untouched in its December 1997 amendments to Minnesota's Code of Judicial Conduct, Wersal further testified the 1997 amendments banning judicial candidate speech to political party gatherings and the candidate's use or acceptance of endorsements reflected increased court hostility to judicial speech:

> [W]hen the Minnesota Supreme Court made the decision they made to change the rules on January 1, 1998, (sic) it became very obvious to me that they were hostile . . . to candidates' First Amendment rights and that I had to be far more circumspect in what I said or didn't say in 1998 as opposed to what I think I did in 1996 or even '97.

J. App. 1:181-82. Thus, even if Wersal believed in 1997 that he could deliver some message, however inadequate, under the Announce Clause, this was no longer true after the Minnesota Supreme Court revised the Minnesota judicial canons and Wersal filed this action.

Finally, the State ignores the Announce Clause's application to Wersal's family, supporters, and voters through Canons 5(A)(3)(a) and (c). P. App. 133a. Even assuming that the Announce Clause causes no constitutionally cognizable injury to candidates, Wersal's family members and others who know him are plainly injured: They are not candidates, but the canons coerce

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Clause. J. App. 1:21. In contrast, Wersal testified that without the Announce Clause he could have stated whether he agreed with opinions authored by the Justice against whom he ran. J. App. 1:217.

them into silence regarding the candidate's views as the price of saving their friend and relative from losing his or her judicial job or his or her license to practice law. Likewise, voters suffer injury in the inability to learn the candidate's views on relevant issues directly from the candidate and his supporters.

II. Minnesota's Judicial Selection Process Supports the Right of Candidates to Express, and Voters to Receive, Candidates' General Views on Political and Legal Matters.

Citizens of Minnesota and the majority of States adopted judicial elections because they recognized that many judicial decisions create law through judge's power to make common law, to interpret laws, and to exercise discretion and that judicial elections provide a mechanism for citizens to hold judges accountable for the exercise of their powers. Brief for Petitioners Gregory F. Wersal, et al. ("Wersal Br.") 17-28. The State's argument turns this analysis on its head. Despite the fact that Minnesota citizens want periodic judicial elections, the State argues they do not want to receive information about judicial candidates' general views on legal or political issues for fear they might conclude that the judge has "prejudged" future cases. R.B. 2-5. In short, the State argues that Minnesota citizens want or need to be protected from themselves.

The State cites neither constitutional debates nor legislative history of constitutional amendments actually adopted in support of its argument. Rather, the State relies almost exclusively on dicta in *Peterson v. Stafford,* 490 N.W.2d 418 (Minn. 1992). In particular, the State quotes *Peterson,* R.B. 2, in support of the proposition that "the explicit and implicit goal of the [federal and Minnesota] constitutional provisions [for selecting and retaining judges] is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible." 490 N.W.2d at 420.

On the contrary, the Minnesota and United States judicial articles seek to achieve diametrically opposite goals. The goal of life tenure in the federal system is to insulate federal judges from popular political pressure. But the goal of Minnesota's election system, as specifically expressed and recorded in Minnesota's Constitutional debates, is to subject judges to a degree of electoral accountability by requiring them to periodically stand before the voters for election. Wersal Br. at 18-26.

The State again quotes from *Peterson*, R.B. 3: "The 1857 [Minnesota] Constitution restricted the judicial office to persons 'learned in the law.' Implicit in this restriction is the recognition that judges be subject to the ethical canons of the legal profession." 490 N.W.2d at 420 (citation omitted). However, there were no acknowledged "ethical canons of the legal profession" in 1857. In fact, Minnesota did not adopt ethical canons for attorneys until 1955 – 98 years after the adoption of the Minnesota Constitution. W. Foster & M. Anderson, eds., *For The Record, 150 years of Law & Lawyering in*

Minnesota, p. 135 (Minn. Stat. Bar. Ass'n. 1999). Judicial ethical canons were first introduced by the American Bar Association ("ABA") in 1924. Charles Wolfram, *Modern Legal Ethics*, 53-54 (Practitioner ed., 1986). Minnesota's Constitutional debates reveal that judges must be "learned in the law" to ensure judges have the legal competence to perform their duties. It had nothing to do with ethics and is certainly not that judicial candidates should be mute on disputed legal or political issues. *Proceedings and Debates of the Minnesota Constitutional Convention,* (Democratic)(1857) p. 513.

The State also cites *Peterson's* rendition of failed efforts to amend Minnesota's judicial article to eliminate judicial elections, R.B. 3, which are said to reflect "the public's [distaste] for judges to become embroiled in politics." 490 N.W.2d at 420. History reflects precisely the opposite: Minnesota voters have rejected each and every attempt to abolish judicial elections.

Finally, the State argues that gubernatorial appointment for judicial vacancies and the Commission on Judicial Selection (to recommend such appointments) evidences Minnesota's commitment to judicial independence. R.B. 4. However, the fact that such appointees must stand for election within two years reflects Minnesota's overriding commitment to judicial accountability. Wersal Brief at 17-18.

III. ABA Removal of the Announce Clause Was Due to Constitutional Concerns.

The ABA claims that Minnesota's Announce Clause

and the 1990 ABA "commitments clause" have the same effect, despite (1) the ABA repealed the Announce Clause in its 1990 model canon on constitutional grounds, (2) the Minnesota Supreme Court rejected 1990 ABA Canon in 1995 in preference to the Announce Clause, and (3) the ABA concedes that the Announce Clause "contains somewhat different language than the 1990 ABA Canon" that the ABA adopted to replace the language of the Announce Clause.[3] *Brief of the ABA as* Amicus Curiae *in Support of Respondents* ("ABA Brief") 4-5.

The ABA argues that the new "commitments clause" is simply a "revision" of the Announce Clause and fully "corresponds" to Minnesota's Announce Clause. ABA Brief 8-9. However, amendments to existing language are intended to have a "real and substantial effect." *Stone v. INS,* 514 U.S. 386, 397 (1995). Moreover, the ABA's committee reports confirm that the ABA discarded the Announce Clause due to concerns it impinged free speech:

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[3]As the Minnesota Office of Lawyers Professional Responsibility explained to Petitioner Wersal, "The current prohibition contained in Minnesota Canon 5(A)(3)(d)(i)is identical to Canon 7B(1)(c) of the prior ABA Code of Judicial Conduct (1972 version). The parallel provision of current ABA Model Code of Judicial Conduct (1990 version) does not contain a blanket prohibition against announcing views on disputed issues. Instead, the current ABA provision prohibits 'statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.'" J. App. 1:19.

> The committee believed the revised rule [striking the announce clause in favor of the commitments clause] to be more in line with constitutional guarantees of free speech, while preventing the harm that can come from statements damaging the appearance of judicial integrity and impartiality. It also believed that the broad language of the 1972 code's version of the rule cannot be practically applied in its literal terms.

Lisa L. Milord, *The Development of the ABA Judicial Code* 50 (ABA Center for Professional Responsibility).[4]

The ABA's position is contrary to its own committee reports and is based exclusively on the "gloss" the Eighth Circuit and Minnesota Supreme Court have placed on the Announce Clause. Pet. App. 54a; R.A. 1. However, as explained below, what that "gloss" is simply unknown and therefore constitutionally vague.

IV. The New Announce Clause Enforcement Policy Is Void for Vagueness.

The Minnesota Supreme Court now proclaims, for

[4]The ABA first adopted a version of the announce clause in 1924 as Canon 30, which provided "[the judicial candidate] should not announce in advance his conclusions of law on disputed issues to secure class support." Unlike the 1972 version of the clause at issue here, the 1924 version only prohibited judicial candidates from announcing their "conclusions of law" (i.e., a judge's legal determinations on particular issues in specific cases involving specific facts) "in advance" – not the open ended "views on disputed legal or political issues" as contained in the Announce Clause.

the first time, that it will enforce the Announce Clause as if it does not mean what it says, i.e., that candidates cannot "announce [their] views on disputed legal or political issues." Minn. Canon 5A(3)(d)(i). *See* Appendix to R.B. ("R.A.") 1. But what it *does* mean is vague.

The vagueness test for core First Amendment political speech was established in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). This Court held that where a regulation borders on the protected territory of issue advocacy there must be a bright-line express advocacy test. *Id.* at 44. Even the formula "advocating the election or defeat of a clearly identified candidate" was unconstitutionally vague without the preceding modifier "expressly." *Id.* Otherwise, the speaker would be "at the mercy of the varied understanding of his hearers." *Id.* at 43.[5] Thus, the issue is what is the new rule governing judicial candidates' speech and does it establish a bright-line.

Minnesota judicial candidates have followed the Announce Clause because the Minnesota Supreme Court specifically refused to adopt the 1990 ABA's "commitments clause." In 1992, that court specifically stated that "[t]he task of the voter in considering candidates for judicial office is a difficult one, made more difficult by the nature of the office itself: a position that requires its holder studiously to avoid partisan politics

[5]*See Brief Amici Curiae of the American Civil Liberties Union and the Minnesota Civil Liberties Union Supporting Petitioners* 11-17 (discussing *Buckley* standard in relation to the Announce Clause as construed) ("ACLU Brief").

[and] refrain from *all* discussions of public issues." *Peterson*, 490 N.W.2d at 425 (emphasis added). The Minnesota Supreme Court did not list the public issues on which the candidate may comment, as the Eighth Circuit speculated, *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 883 (8th Cir. 2001) ("general discussion of case law or a candidates's judicial philosophy" permissible), because candidates must *"refrain"* from *"all"* such discussion. The message to Minnesota judicial candidates, as reflected in the court's refusal to adopt the 1990 commitments clause, *Peterson's* dicta and the DeMoss prosecution[6], is clear - "Refrain from *all* discussions of public issues" or face sanctions.[7]

Now, for the first time in three decades – and while this case is in the U.S. Supreme Court – Minnesota judicial candidates are told that the Announce Clause will not be enforced as meaning what it says and what everyone thought it meant. The Minnesota Supreme

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[6] *See* Wersal Br. at n. 2 describing an ethical complaint against judicial candidate Michael DeMoss for simply declaring that "the unborn child is a human being, has constitutional rights, and the State of Minnesota needs to protect those rights." J. App. 2:254.

[7] The enforcement threat is real. While the OLPR ultimately decided not to prosecute DeMoss, the defendant in *Deters v. Judicial Retirement & Removal Comm'n*, 873 S.W.2d 200 (Ky. 1994), was less fortunate. Jed Deters approved print advertisements stating he was "a Pro-Life Candidate" and was publicly censured for violating a canon banning "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *Id.* at 202.

Court has "performed a remarkable job of plastic surgery upon the face of the [court rule]" for enforcement purposes. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969).[8] However, this plastic surgery suffers from two defects: It is a changeable enforcement policy and it is unconstitutionally vague.

The Minnesota Supreme Court's *Order* is an enforcement policy, not a statutory construction. The *Order* nowhere says what *is* the "construction" of the Announce Clause, referring instead to "adopting the interpretation of the federal court of appeals." R.A. 1. However, the "adoption" was solely for the purposes of enforcement. The court declared plainly that "the announce clause . . . shall be enforced in accordance with the interpretation . . . by the . . . Eighth Circuit." It did not set forth the construction of the challenged provision as this Court did carefully and fully in *Buckley*, 424 U.S. at 39-44.

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[8] In *Shuttlesworth*, 394 U.S. at 156, this Court declared that "[i]t would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later." Even greater clairvoyance would be necessary in the present case in light of the Minnesota Supreme Court's express refusal in 1995 to adopt the language of an ABA canon that the Minnesota Supreme Court now attempts to approximate with its present enforcement policy for the Announce Clause. The Eighth Circuit's construction – whatever it is – that has been adopted as an enforcement policy by the Minnesota Supreme Court has the character of a "disingenuous evasion." *Cf. Salinas v. United States* 522 U.S. 52, 60 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 57 n.9 (1996).

Because the Minnesota Supreme Court's *Order* is an enforcement policy, not a decision in a case, it lacks even the persuasive protection of *stare decisis*. The Court was acting as an administrative agency for the Minnesota courts, and such an agency enforcement policy can be as easily changed tomorrow as it was announced today. *Cf. Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) ("Nothing . . . prevents the Commission from enforcing its rule at any time with . . . another change of mind of one of the Commissioners.").[9] Given the Minnesota Supreme Court's earlier refusal to adopt the 1990 ABA revisions to the Announce Clause, it is plain that it has a clear preference (absent pending litigation threatening its canon) for the unconstrued language of the Announce Clause – arguably making a reversion of enforcement policy possible or even likely.

But even if this plastic-surgery enforcement policy were a real construction, it is still unconstitutionally vague. Rather than providing the text of the new Announce Clause policy, the Minnesota Supreme Court merely cites to the Eighth Circuit's opinion. But the Eighth Circuit and the district court said different things at different places in their opinions.

The district court "[found] that the Minnesota Supreme Court would interpret the announce clause

[9] *Cf. Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) (Courts are not "compelled to leave '[t]he defendant . . . free to return to his old ways.'" (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)).

narrowly, *consistent with* the construction urged upon the Court by the Judicial Board." P. App. 128a (emphasis added). The construction the BOJS urged was "to prohibit a candidate's public statements of opinion on disputed legal or political issues *that may come before the courts*." Dist. Ct. Docket #84 at 26 (Def. Flinn's summary judgment brief) (emphasis added). The proffered construction merely added the phrase "that may come before the courts."

But the district court's construction was not "consistent with" its finding because it held the announce clause constitutional by "interpreting [it] as only prohibiting *discussion of a judicial candidate's predisposition* to issues likely to come before the court." P. App. 129a (emphasis added). The trial court, and later the Eighth Circuit, completely excised both (1) the phrase "disputed legal or political," which modified and narrowed "issues," and (2) the "announce an opinion" language of the Announce Clause, although they vacillated on what they had substituted. While the district court spoke of "prohibiting *discussion of a . . . predisposition* to issues," it justified its construction on the basis of a state interest in "preventing a candidate from *committing* himself/herself as to certain issues prior to being faced with a particular case or controversy." P. App. 124a (emphasis added).

The Eighth Circuit described the Announce Clause as "prevent[ing] candidates from *implying* how they would *decide cases* that might come before them as judges." P. App. 45a (emphasis added). It cited the

district court as "construe[ing] the Announce Clause to apply only to *discussion of a candidate's predisposition* on *issues* likely to come before the candidate if elected into office." P. App. 52a (emphasis added). It said the trial court construction "prohibits candidates only from publicly *making known how they would decide issues* likely to come before them as judges," P. App. 53a (emphasis added), which "announcements," the Eighth Circuit declared, are "calculated to show that the candidate will decide *cases* in a certain way if elected." P. App. 53a (emphasis added).

So what is the Minnesota Supreme Court's new enforcement policy? Is it announcing an *opinion*? *Discussing a predisposition*? *Committing* to decide a certain way? *Implying* how one would decide? Publicly *making known* how one would decide? On *all disputed legal and political* issues? On *all issues* likely to come before the court? On *cases* . . . ?

The lower courts didn't simply tack "that may come before the courts" onto "disputed legal or political issues," as the BOJS suggested. Dist. Ct. Docket #84 at 26. The lower courts excised "disputed legal and political" and converted "announce an opinion" into something . . . but they're not sure what.

Finally, the text of the new enforcement policy remains unknown to both the State[10] and its amici

[10] First the State says "the Announce Clause precludes judicial 'candidates only from *publicly making known how they would decide issues* likely to come before them as judges.'" R.B. 1 (quoting Eighth Circuit, P. App. 53a) (emphasis added). Then they surreptitiously slip

curiae.[11]

from "issues" to " cases," declaring that "[t]he import and meaning of the Announce Clause is clear: judicial candidates cannot publicly make known how they will decide *cases* likely to come before them as judges." R.B. 12 (emphasis added). The State reemphasizes this, declaring, "[i]n short, the *only* type of campaign speech that the announce clause restricts is public statements regarding how candidates would decide cases likely to come before them." R.B. 37 (emphasis in original). They conclude that "[t]he meaning of the announce clause is clear: judicial candidates cannot publicly make known how they would decide issues likely to come before them as judges." R.B. 47.

[11] The *Brief of Amicus Curiae Pennsylvanians for Modern Courts in Support of Affirmance* insists the rule proscribes only "statements of predisposition." *Id.* at 19, 21, 23, 24.

The *Brief of Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary as Amicus Curiae in Support of Respondents Supporting Affirmance* declares "that a judicial candidate may not announce his or her views on disputed legal issues that may come before the court." *Id.* at 20.

The *Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondents* insists "the speech at issue in this case are statements by judicial candidates indicating or promising how they would rule in cases likely to come before them – in essence, committing themselves to an outcome before hearing the merits of a case," *id.* at 11, but might really mean "campaign promises," *id.* at 12, "announc[ing] a predisposition on an issue," *id.* at 17, or "promis[ing] to rule in a particular way or mak[ing] sweeping policy proclamations." *Id.* at 20.

The *Brief of Amicus Curiae the Missouri Bar Association in Support of Respondents* argues the rule prohibits "judicial candidates mak[ing] comments about matters on which they must later rule as judges." *Id.* at 4. *Cf. id.* at 13 (same).

If the lower courts, the State and their amici curiae cannot agree on what is the text of the new enforcement policy, the policy is void for vagueness simply because no one knows what it is.[12]

The enforcement policy is also void for vagueness because the various efforts to describe it employ words with differing meanings and interchange words that are not synonyms. For example, there are important differences between *cases* and *issues* in legal use, although the State wants to use them interchangeably in their theories of what is the enforcement policy. "Case" has a strong body of legal meaning, e.g., in the Article

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The *Brief in Support of Respondents for* Amici Curiae *Brennan Center et al.* argues that "a candidate may discuss her legal and judicial philosophy generally, as long as she does not commit or appear to be committing herself to decide a case or class of cases in a particular manner." *Id.* at 23-24.

The *Brief of Amicus Curiae Minnesota State Bar Association in Support of Respondents* ("Minnesota Bar Ass'n Brief") tells us whether potentially affected lawyers can understand the new enforcement policy and declares that the "construed" and "affirmed" announce clause is neither overbroad nor vague because it "extends only to "'issues likely to come before the court'" – completely ignoring the debate about the meaning of "announce an opinion." *Id.* at 8, 24.

The *Brief of Amicus Curiae Conferences of Chief Justices in Support of Respondents* declares "the Eighth Circuit . . . construed the announce clause . . . to apply only to statements displaying a predisposition on issues likely to come before the elected judge." *Id.* at 15.

[12] If the Announce Clause could be construed as identical to the 1990 ABA Canon, it would still be the unconstitutionally vague commitments clause as explained in the ACLU Brief at note 5.

III context of "cases and controversies," and is "[a] general term for an action, cause, suit, or controversy, at law or in equity." *Black's Law Dictionary* 195 (5th ed. 1979). In contrast, an "issue," as used in pleading and practice, is "[a] single, certain, and material point, deduced by the allegations and pleadings of the parties, which is affirmed on the one side and denied on the other." *Id.* at 745. Similarly, there are important distinctions between other key terms used by the Eighth Circuit. "Implying" is radically different from either "announcing" or "declaring" how one will decide either cases or issues. And "declaring" is quite different from "making known" a position. Because the new enforcement policy is whatever the Eighth Circuit said and that court said conflicting things, the policy is unconstitutionally vague.

The new Announce Clause enforcement policy is also unconstitutionally vague because of the Eighth Circuit's reliance on the vague terms "implying" and "making known." P. App. 45a, 53a. The critical question is whether a proper First Amendment bright line has been established to identify what is beyond the pale – or whether the new policy risks impaling hapless candidates? "Implying" is precisely the sort of nebulous standard that this Court has eschewed in the heightened-protection First Amendment area. *Buckley*, 424 U.S. at 44 and n. 52. "Making known" is similarly vague potentially encompassing such obscure things as publishing a resume showing membership in organizations that take positions on social issues, e.g., NRA, NARAL,

NRLC.[13]

The State and the Eighth Circuit both claim that within the pale are "'general discussions of case law or a candidate's judicial philosophy.'" R.B. 7 (quoting *Republican Party of Minnesota v. Kelly*, P. App. 54a), 11.[14] But does this establish a bright line? Because the Eighth Circuit said that the Announce Clause encompassed "implying how [candidates] would decide cases,"

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[13]This point is made well in the ACLU Brief at 14-15, which states that the phrase "*making known*" is vague and that "[t]o avoid unconstitutional vagueness, any such regulation must be limited to speech by judicial candidates that 'expressly commits them to a particular result in a particular case likely to come before them.'"

The Minnesota State Bar Association argues that the ACLU Brief declared the phrase "likely to come before the court" is vague, but then used the phrase (thereby allegedly admitting that it is not vague) in the ACLU's own formulation that an acceptable provision "must be limited to speech by a judicial candidate that expressly commits them to a particular result in a *particular* case likely come before them." Minnesota Bar Ass'n Brief at 25 n. 5 (quoting ACLU Brief at 3) (emphasis added). However, the ACLU's focus on a "particular case" eliminates the inherent vagueness of "likely to come before a court." At the other extreme, coupling "likely to come before a court" with "issues," as in the unconstrued Announce Clause, must either be a limitation without real limit, or vague because it is unclear where is the limiting line. Moreover, in the ACLU Brief at 3, the real focus of vagueness analysis is on the phrase "*making known* a candidate's view" (emphasis added), which is unconstitutionally vague for the reasons given there and the ACLU Brief at 9-18.

[14]The "general" language is vague because it is a "classic term[] of degree" without "settled usage or tradition of interpretation in law." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991).

P. App. 45a, 53a, where is the line between talking about prior decisions and implying how that candidate would decide differently if confronted with a similar case? And where is the line between discussing judicial philosophy, e.g., history-and-tradition versus living-constitution models, and implying that a candidate would vote differently than a candidate of the opposite philosophy in a particular case? There is no line, let alone a bright line.

Petitioners have already explained how this new "general discussion" gloss by the Eighth Circuit is itself unconstitutionally vague, Wersal Br. 41-42, and the State's response is woefully inadequate. First, the State ignores the heightened requirement for clarity with regard to core First Amendment political expression. Second, it declares that "a judicial candidate who is familiar with the role of a judge should be able to comprehend the Announce Clause as construed." Third, it ignores application of the enforcement policy to non-judges. R.B. 47.

Do judicial candidates know the text of the new enforcement policy? The district judge and the Eighth Circuit judges couldn't settle on a single statement of their construction and their statements are contradictory; different federal courts of appeal have interpreted similar announce clauses differently. ACLU Brief at 13 n8. Moreover, as set forth in ft. nt. 11 above, the State and its amici, who are judges and lawyers, can't agree on the language of the construed Announce Clause; the judges of the Minnesota Supreme Court didn't even try

to articulate their new enforcement policy, adopting instead a whatever-*they*-said approach. The candidates-will-know response rings hollow.

Finally, the State completely ignores Canon 5's mandate that judicial candidates "encourage family members to adhere to the same standards" and "prohibit" and "discourage" "employees and officials" "from doing on the candidate's behalf what the candidate is prohibited from doing." P. App. 133a. These people are not judges or even attorneys. By its reliance on a candidates-will-know response, the State has conceded vagueness with respect to all the other people affected by the new Announce Clause enforcement policy.

CONCLUSION

Petitioners pray this Court to reverse the Eighth Circuit and hold the Announce Clause unconstitutional.

Respectfully submitted,

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v.

VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Reply Brief for Petitioners Republican Party of Minnesota, Et Al.

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement remains unchanged. *See Petition for a Writ of Certiorari* at ii.

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REPLY BRIEF FOR PETITIONERS REPUBLICAN PARTY OF MINNESOTA, ET AL.

ARGUMENT

I. The Announce Clause Is Based on a Fundamental Misconception about Judges and the Judiciary.

Judges have public policy preferences and views on what the law is and should be, which have often been expressed in legitimate and salutary ways. When judges have discretion under the law or have been authorized to make law, those views will likely influence them. But when discretion has been denied judges, i.e., when the public policy choice has been made by constitutional provision, statutory enactment, or the stare decisis effect of prior court decisions, judges can be expected to follow their oath and apply the law to the case at hand, regardless of their personal views, or recuse themselves. This is what the electorate understands about judges, and it expects judges to act in this way. The electorate will reject judges it believes prejudge cases and thereby abandon their oath to follow the law.

The announce clause denies this reality and is based on two faulty assumptions: that the views of a judge do not matter[1]

[1] The rule [prohibit(ing) candidates from announcing their views on disputed legal and political issues] appears to be founded on the proposition that these views are, or should be, irrelevant to the judge's task.... Even supporters of the premise admit that judges sometimes face legal questions in which neither statute nor case law gives a firm answer. In such cases, a judge must turn to other grounds of decision, which can include the judge's views of good social policy, basic sense of fairness, or similar grounds, each of which will be affected to some

and that if a judge expresses her views on the law she can be expected to violate her oath and follow her personal views regardless of the facts and law of the particular case. However, judges do have views that influence them, *see The Responsible Judge: Readings in Judicial Ethics* 100 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993) [hereinafter *Responsible Judge*] ("'[V]alue choices' . . . are an inevitable ingredient of judicial decision making. The critical question is not *whether* value choices enter into the judicial interpretation of law, but *how* they enter and *from whence* they are derived."),[2] and these views matter since judges do make law in many legitimate ways, particularly state court judges. *See* Otto Kirchheimer, *Conditions of Judicial Action* and *Summing Up, in Responsible Judge* 50 & 61; Oliver W. Holmes, *The Common Law* 336 (1881); Benjamin N. Cardozo, *The Nature of the Judicial Process* 113-15 (1921); *Gregory v. Ashcroft*, 501 U.S. 452, 466-67 (1991). Since the people have reserved the selection of judges to themselves, they have a legitimate interest in knowing the judges' views. Furthermore, judges can be presumed to follow

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degree by the judge's legal and political views.

Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 85 (1990) ("*Electing Justice*"). "[Thus,] [i]f . . . we start with the proposition that judges cannot or should not disassociate themselves from their moral, social or political views, then we might permit or even encourage judicial candidates to discuss those views." *Id.* at 71. "This publication is used by the [Respondent] Board on Judicial Standards and its Executive Director in advising judicial candidates on proper campaign conduct." Joint Appendix 17 n.1 ("J.A.").

[2] *See also* John T. Noonan, Jr., *The Passengers of Palsgraf, in Responsible Judge* 22; Martha Minow & Elizabeth V. Spelman, *Passion for Justice, in Responsible Judge* 257.

their oaths or recuse themselves. Rep. Party Br. 13-21. As a result, expressions of views on the law by judges are encouraged by other judicial canons and are, in fact, a fundamental judicial function.

However, prohibiting judicial candidates from *pledging or promising* certain results in particular cases strikes the right balance. The pledges or promises clause recognizes that judges have views on the law, that these views will influence judges in exercising their discretion or in legitimately making law, and that, therefore, it is appropriate for the voters to know these views when selecting judges. But the pledges or promises clause also recognizes that it is contrary to a judge's oath to pledge or promise certain results in particular cases, regardless of the law or facts in that case.

In the same way, the pledges or promises clause strikes the proper First Amendment balance between the role of voters and candidates in elections and the interest in preserving the public perception of the impartiality of the judiciary. Voters are entitled to information about the general views of candidates on legal and political issues, and candidates have an interest in providing their views, especially when they are attacked. But it would undermine the public perception of the impartiality of the judiciary if the public were led to believe that it is appropriate for judges to pledge to violate their oath when in office.

The State, however, presents a simplistic formula upon which it bases an impossible dilemma in order to justify the announce clause. Its simplistic formula is that, if a judge expresses an opinion on a disputed legal or political issue,[3] she

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[3] Petitioners use the canon's language herein, understanding that the

has signaled how she will rule on that issue if it comes before her, no matter what the facts and the law are at the time. This then gives rise to the State's purported dilemma when a judge decides a case: if she decides the case consistent with her prior expressed view, she will be viewed by the electorate as having prejudged the case, and if she decides the case differently, she will be viewed as a dissembler. The only way out of this dilemma is silence, enforced by the state courts through the announce clause.

The State's argument is based on a series of fallacies. First, judges do have views, and these are often expressed in writings, speeches, public service, and deciding cases. A judge without views on the law would be unworthy of judicial appointment, and silence about these views over a lifetime is impossible. Second, announcing a view on a legal or political issue does not say how a judge will decide a particular case.[4] Often these

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Eighth Circuit construed it to have something to do with "implying," P. App. 45a, and that the State insists "announce" is broader than "pledges or promises." R.B. 41. But the Minnesota Supreme Court's textless new enforcement policy, R.A. 1, is too vague to determine the rule. *See* Wersal Reply Br. at IV. Furthermore, the entire Wersal Reply Brief is adopted and incorporated herein by reference.

[4]Examples abound. Justice Story explained his rejection of his own former opinion by stating: "My own error, however, can furnish no ground for its being adopted by this Court." *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 478 (1827). Justice Jackson concurred in an opinion contrary to his opinion as Attorney General and quoted Lord Westbury: "'I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.'" *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950). Judge Friendly dissented from a decision of the Second Circuit which relied on a law review article that Judge Friendly had authored. *Williams v. Adams*, 436 F.2d 30, 34 n.2, 35 (2d Cir. 1970). In *Hoy v. State*, 353 So.2d 826, 832 (Fla.

views are tentative and, upon fuller reflection, can and will change. Judges grow in their full appreciation of the law over time, and their judgment matures. Judges decide cases as full human beings, not mere repositories of legal views or skill, because judging requires compassion and fairness as judges seek to do justice in a particular case. Third, and most important, the voters know the difference. The electorate knows that judges have views on the law that may influence them, but they also expect judges to be impartial in deciding cases. Far from wanting judicial candidates to pledge themselves to specific outcomes in particular cases, the electorate poses the risk of defeat for judicial candidates who appear partial through their statements or judicial conduct.

It is true that there is tension between judicial accountability and independence in any method of judicial selection. *Electing Justice* at 7-8. While Minnesota has ensured independence of its judiciary from executive or legislative pressure through various constitutional provisions, it chose to make judges accountable to the people through periodic elections.

This choice gives rise to First Amendment protections of judicial candidate speech and the right of voters to receive this speech that are absent in merit selection systems. In some respects, the independence of the judiciary may be seen as compromised by elections, in ways that do not arise where appointment or merit selection is used to select judges with life tenure. *Chisom v. Roemer*, 501 U.S. 380, 400-01 (1991) ("The

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1977), a Florida trial judge is quoted as declaring that "[I] have long been opposed philosophically to capital punishment, and publicly stated . . . so on numerous occasions throughout the years," but then writing that "this Court must follow the dictates of the law" and imposing the death penalty.

fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.").[5]

However, this is the balance between accountability and independence that the people of Minnesota have struck and, as a result, they have the judiciary they have selected. If Minnesota doesn't like the result, it can provide for another system, such as merit selection of judges. Once the State chooses an elective system, it must also accept that inherent in that choice are the free speech rights of candidates and voters. But judicial impartiality can still be protected, and public perception of that impartiality preserved, by ensuring that judicial candidates in elections do not pledge or promise certain results in particular cases.

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[5] The wide variety of judicial selection methods chosen by the states testifies to our divergence of views about how to strike a balance between these competing concerns. Purely appointive systems tend to ensure the judges' independence and impartiality, but raise questions about accountability. Elective systems in any form give greater weight to direct popular accountability, but raise questions about the judges' ability to retain their independence and impartiality. It is no wonder that states have reached different conclusions on these matters, or that many states employ more than one system.

Electing Justice at 8.

II. That Each Justice Has Announced Views on the Disputed Legal Issue Here Does Not Deprive this Court of Actual or Apparent Impartiality in Rendering a Decision in this Case.

Throughout its Brief, the State quotes statements made by Justices of this Court during their confirmation hearings, in effect arguing that this Court has already unanimously approved the announce clause. *See* Brief and Appendix for Respondents 17, 21, 24, 25, 29-32 ("R.B."). The State concludes its Brief by asserting that "[e]ach Justice of this Court articulated a common principle during their confirmation hearings ... namely, that it would be improper for a judicial nominee to publicly state a position on issues likely to come before the Court." R.B. 48. Statements made during confirmation hearings are thus treated like judicial precedents, binding through stare decisis the decision of each Justice of this Court in this case.[6]

Paradoxically, the State would place the Justices of this Court on the horns of the very dilemma that they and the Eighth Circuit claim that the announce clause is intended to avoid -- namely, that "after being placed on the bench, the judge must follow his or her statements and be accused of prejudging the case or must ignore the statements and be accused of being

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[6] Petitioners are unaware of any case in which a judge was regarded as bound by any statements on issues made during an election campaign or confirmation process. The State's argument not only assumes that judicial nominees and candidates cannot be trusted to separate personal views on issues, when appropriate, from the manner in which they would decide a particular case, but it also assumes that judges will not alter their views upon fuller reflection. They thus seek to bind the Justices of this Court based on general views expressed in the particular context of confirmation hearings held as long as a quarter century ago.

a 'dissembler.'" R.B. 48 (quoting *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 878 (8th Cir. 2001), Appendix to Petition for Writ of Certiorari 46a ("P. App")).

Rather than demonstrating a need for the announce clause, the State's argument underscores the truth in Judge Posner's observation on the identical language of Illinois' announce clause: for the judicial candidate operating under the announce clause, "the only safe response . . . is silence" about any issue that stimulates political or legal controversy. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 228 (7th Cir. 1993).

The preposterous conclusion that follows from accepting the State's argument highlights the defective nature of its premise. Contrary to the State's argument, even if the Justices have announced their views on the propriety of judicial nominees answering certain questions about their legal or political views, this by no means impugns the actual or perceived impartiality of this Court to render a decision here. Nor are the Justices in any sense bound by the statements made in their confirmation hearings. Similarly, candidates for judicial elections need not remain silent on disputed legal or political issues to retain subsequent credibility in rendering future legal decisions. Consequently, the announce clause does not further the State's compelling interest in judicial impartiality.

First, none of the statements made by Justices cited by the State pledged or promised any particular outcome in this case. At most, the statements of the Justices expressed appropriate personal reservations about offering "hints" or "forecasts" on how votes would be cast. *See, e.g.*, R.B. 31 (Justice Ginsburg).[7]

[7]Justice Stevens also expressed concerns about making general comments on subjects "that were not carefully thought through," yet "might be given significance that they really did not merit." R.B. 31. Justice Kennedy believed that the public expects that Justices will not be confirmed on the basis of "particular positions on the issues," but rather that the public expects that the Senate will confirm on the basis of temperament and character. R.B. 42. Justice Souter opined that anything that could substantially inhibit a judge's capacity to "listen truly and to listen with a[n] open . . . mind" should be "off limits to a judge," expressing concern about the "pressure that would be on a judge who had stated an opinion or seemed to have given a commitment" during Senate confirmation proceedings. R.B. 25-26. Justice Breyer stated that he did not want "to commit [him]self on an open issue that [he] fe[lt] is going to come up in the Court," since mistakes might be easily made in the context of a confirmation proceeding and because it is "important that the clients and the lawyers understand the judges are really open-minded." R. B. 28-29. Chief Justice Rehnquist refused to answer specific questions regarding specific matters, such as the legitimacy of the presence of the U.S. military in Laos. R.B. 17. Justice Thomas recognized the need for a judge to ask, "Are we impartial or will we be perceived to be impartial?" R.B. 29. Justice Scalia expressed concern that one who "has made a representation in the course of his confirmation hearings . . . that he will do this or that . . . would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter." R.B. 29-30.

The State characterizes the Justices' statements as expressing support for the "Announce Clause principle." R.B. 25, 28, 29. However, if the announce clause "principle" is that judges should avoid actual or perceived lack of impartiality, this is not in dispute. Petitioners readily acknowledge that there is a legitimate and compelling interest in protecting actual and apparent judicial impartiality. Rather, the issue before the Court is whether the announce clause -- which clearly abridges the First Amendment rights of candidates, supporters, and voters --

is necessary to protect the public perception of judicial impartiality.

If the "Announce Clause principle" that the State claims the Justices of this Court have adopted is that judicial nominees and candidates may not express a point of view on disputed legal or political issues, then, by the State's logic, Justices of this Court have violated the "principle" by expressing a view on this very subject. Thus, if the State's theory is correct, the present Justices of this Court would be required to consider recusal. But under current practice, Justices of this Court need not recuse themselves simply because they announced their view on certain topics. The State's argument suggests a significant change in this practice.

But just as the members of this Court were free to decline to comment on legal and political issues to the extent that they deemed prudent during confirmation proceedings, so Minnesota judicial candidates would be under no compulsion to speak in the absence of the announce clause. It is one thing to question the wisdom of discussing views on a particular subject before the Senate or the electorate. It is quite another for the State to punish judicial nominees or candidates by depriving them of their judicial position or ability to practice law if they, their families, associates, or supporters publicly express the general views of the candidates on political or legal issues.

In fact, the announce clause would tend to subvert the very interest in preventing actual or perceived judicial partiality that it purports to serve. Voters ought to have information on the temperament, character, and impartiality of potential judges in order to properly evaluate them. A judicial candidate who recklessly announces positions on issues to the point where

voters sense that he lacks impartiality risks rejection by the voters.[8] Similarly, the voters need to know if a candidate runs on racist, sexist, or similar antisocial themes so that such candidates may be rejected. Too strict rules on what a candidate may say dresses the candidate up in a metaphorical three-piece suit. The voters need to hear the candidates' messages to see clearly who they are.

Second, the State's argument assumes that simply stating a view on a political or legal issue carries the necessary implication that the judicial candidate or nominee will decide a case in a certain way. But even if this possible implication were sufficient to justify an outright ban on expressing any views, it is nevertheless irrational to ban only the speech of judicial candidates, as the announce clause does, while encouraging judges to lecture, write, and teach on legal subjects and advocate changes in the law.[9] Indeed, if the State's theory is

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[8]In this respect, the enforced silence imposed by the announce clause makes such an informed decision by voters more difficult or impossible. It does not alter the fact that certain judicial candidates may lack impartiality; it only ensures that voters will not know that fact about the candidate.

[9]Minn. Canon 4(B) authorizes "avocational activities" by judges including advocating "revision of substantive and procedural law and improvement of criminal and juvenile justice" which she "is encouraged to do . . . either independently" or through professional organizations. 52 M.S.A., Code of Jud. Conduct, Commentary. This canon authorizes judges to widely announce their views on disputed legal and political issues. As a result, the State has failed to "demonstrate its commitment to advancing [its] interest by applying its prohibitions evenhandedly." *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). This canon, and the other purported exceptions to the announce clause enforcement policy recently adopted by the Minnesota Supreme Court, also "diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52

correct, the threat that the public will perceive a lack of impartiality when a sitting judge announces an opinion on a disputed legal or political issue is greater than the threat posed when a candidate does the same thing. This is so because sitting judges presently wield actual power to implement their points of view and because the statements of a sitting judge are likely to be taken more seriously than those of judicial candidates.

Moreover, whatever implications that an announced point of view on an issue might carry, they are no more weighty than the implications suggested by the associations and conduct of judges. A judge's professed allegiance to a particular religion, known life-style choice, adherence to a particular philosophy, racial or gender characteristics, or even selection of clients might carry the implication that the judge will decide a case in a certain way. But it is rightly presumed that judges will still be able to decide impartially.[10]

Any causal connection between the expression of general views on an issue and the possible appearance of lack of impartiality in a particular case is far too attenuated to justify

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(1994).

[10] *See In re Disqualification of Fuerst*, 674 N.E.2d 361(Ohio 1996) (Roman Catholic judges should not be automatically disqualified from hearing case involving sexual abuse by Catholic priest); *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (recusal not required in abortion case on grounds that Ninth Circuit Judge John Noonan's "fervently-held [Roman Catholic] religious beliefs would compromise [his] ability to apply the law."); *Idaho v. Freeman*, 507 F. Supp. 706, 727-29 (D. Idaho 1981) (background affiliations, including Mormon religious association, should not be considered as grounds for disqualification in case involving proposed Equal Rights Amendment).

the draconian announce clause. Even if the announce clause is rationally, if remotely, related to protecting an interest in the public perception of judicial impartiality, its blunderbuss approach is not narrowly tailored to satisfy only this interest, nor is it the least restrictive means available to do so.

III. The Interest at Stake in this Case Is in Assuring the Public Perception of Judicial Impartiality, Not in Protecting Judicial Independence.

Petitioners readily agree with the validity of the State's compelling interests in judicial independence and impartiality. Throughout its Brief, however, the State consistently confuses these interests, conflates them, and thereby argues that the announce clause serves both. *See* R.B. 20 n. 4.

Plainly, however, the Minnesota Constitution, while providing for the independence of its judiciary from the legislative and executive branches, does not intend that the judiciary be free from the people. The State, therefore, cannot plausibly argue that the announce clause is supported by an interest in judicial independence from the necessary implications of accountability to the people in periodic elections.

The several citations the State provides in favor of "judicial independence" here really reflect the distaste of many authorities for judicial elections -- matters that have been debated since the inception of the Republic. *See, e.g.*, R.B. 15-19. Any concerns about judicial elections, however, can be addressed by the people of Minnesota through amendment to their Constitution, not by stifling the rights of judicial candidates and voters that are protected by the First Amendment of the federal constitution. Likewise, to the extent that there are legitimate concerns about maintaining judicial impartiality in

the face of political pressures in elections, these concerns are (and can be further) addressed by methods that do not ride roughshod over free political speech – such as rules against pledges and promises, contribution limits, and recusal requirements.[11]

IV. The State Offers No Substantial Evidence in Support of a Need for the Announce Clause.

The State relies on alleged "evidence of widespread and longstanding consensus" to support its claim that the announce clause is necessary. R.B. 33 (citing *Republican Party of Minnesota*, P. App. 49a, citing *Burson v. Freeman*, 504 U.S. 191 (1992)).[12] But unlike the circumstances in *Burson*, in which the

[11]Respondents erroneously claim that the "essence of Petitioners' argument is that the public deserves judges who have less independence and impartiality than their mail carriers." R.B. 14 (citing *U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973)). To the contrary, the essence of the State's argument is that judicial candidates, their families and associates, and the voters deserve less freedom of speech than mail carriers. There is a fundamental difference between barring government employees from political organizing and barring candidates for election from speaking on issues, and this Court has not held that the government can forbid mail carriers from even expressing their views on disputed legal and political issues.

[12]The State cites *Moon v. Halverson*, 288 N.W. 579 (Minn. 1939), and *Peterson v. Stafford*, 490 N.W. 2d 418 (Minn. 1992), to support its argument of a consensus in Minnesota "about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way." R.B. 33 (quoting *Republican Party of Minnesota*, P. App. 49a). However, *Moon* was largely concerned with political party partisanship in judicial elections, and the only consensus reached was that a statute prohibiting party designations for certain candidates applied only when filing for nomination and on the ballot itself. *Moon*, 288 N.W. at 581. Furthermore,

polling place electioneering bans at issue were decades old and nearly universal, there is no "long, uninterrupted, and prevalent use," *Burson*, 504 U.S. at 208, of the announce clause that might make specific evidence about the clause's value difficult to adduce. The Minnesota announce clause is fairly novel and far from universal. *See* Wersal Br. 26-30. Thus, it should have been a simple matter to "put on witnesses who can testify" from personal knowledge "as to what would happen without" an announce clause. *Burson*, 504 U.S. at 208. Yet they have offered no such evidence.[13]

Nine states have partially or fully elected judiciaries and have either no announce or commitments clause or a provision

neither the holding of *Peterson* nor the history it traces addresses or even considers the speech restrictions at issue here, but instead *Peterson* focuses on concern and debate over "the inherent tension in the judicial election process" that culminated in the recommendation and rejection of "a Missouri-type retention plan" in 1972. 490 N.W.2d at 422-23.

[13]The State relies on an affidavit by former Minnesota Governor Arne H. Carlson as evidence of a consensus in Minnesota about the necessity of judicial campaign speech restrictions. R.B. 34 n.6. But the former Governor's main concern was that partisan elections "erect additional barriers" to seating "the best qualified candidates available." J.A. 245, 247 ¶ 5. He also opined that newspaper headlines touting political party endorsement of judicial candidates would "greatly harm the public's confidence in the independence of the judiciary." *Id.* 247-48 ¶ 6. Former Minnesota Supreme Court Chief Justice A.M. Keith expressed a similar concern with partisan elections, i.e., that the "prospect of facing a contested election . . . is daunting to most judges" and that "partisan campaign activities" would lead "many qualified judges and potential judges . . . not to participate." J.A. 266, 268 ¶ 5. He did not address the announce clause or its substance, and only mentions Canon 5 in reference to its prohibition of soliciting campaign contributions, party endorsement, and "other campaign activities." *Id.* ¶ 6.

that is significantly more speech permissive.[14] Were the State's conjecture true, then "widespread recusals and disqualifications" based on judicial electoral announcements would be common in these nine states. R.B. 44. In addition, judicial decisions in these states would "always be suspect." R.B. 43. There is no evidence, however, that this has happened. Indeed, where state courts have opined on the matter in these states, the courts recognize that a judicial candidate's public view on an issue or public statement on judicial philosophy is insufficient to require recusal or disqualification.[15]

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[14]Alabama, Ala. R. Jud. Ethics Canon 7(B)(1)(c) ("A candidate for judicial office . . . shall not announce in advance the candidate's conclusions of law on pending litigation"); Connecticut (none); Idaho (none); Michigan (none); North Carolina (none); Oregon (none); Texas, Tex. Code Jud. Conduct Canon 5(1) ("A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case."); Utah (none); Wisconsin, Wis. Sup. Ct. R. 60.06(3) ("A judge who is a candidate for judicial office shall not make or permit others to make in his or her behalf promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power. A judge shall not do or permit others to do in his or her behalf anything which would commit the judge or appear to commit the judge in advance with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor.").

[15]*See Papa v. New Haven Federation of Teach.* 444 A.2d 196, 206 (Conn. 1982) ("[I]t is difficult to perceive why judges' general, extra-judicial comments concerning legal issues disqualify them from hearing later cases involving those issues."); *Olsen v. Doerfler*, 165 N.W.2d 648, 654 (Mich. Ct. App. 1969) (no disqualification required where a judge publicly criticized obscenity and pornography before ruling on an obscenity matter); *Oregon v.*

Beyond state case law, judicial conduct commissions maintain summaries of the types of complaints filed with their commissions against judicial candidates. Six of the nine states publicly disclosed summaries of the operations of their commissions through annual reports.[16] If the State's imagined harms were real, judicial commission reports would reflect these concerns. In fact, the majority of judicial complaints in these states are dismissed.[17] Those complaints related to "failure to

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Crookham, 731 P.2d 1018, 1023 (Or. 1987) (grounds for disqualification must "relate to a judge's impermissible animus toward a particular party or attorney"); *Rogers v. Bradley*, 909 S.W.2d 872, 883 (Tex. 1995) (Justice Enoch, responding to declaration of recusal, noted that his statements did not require his recusal because they did not indicate a "promise either of a particular result nor an endorsement of any other candidate or issue."); *State v. Sinks*, 483 N.W.2d 286, 291 (Wis. Ct. App. 1992) (no due process rights violated when a judge fails to recuse himself because issues present in the litigation are similar to those that are highly contested in the judge's reelection).

[16]Alabama, Connecticut, Michigan, Texas, Utah, and Wisconsin all publicly disclose some record of their judicial conduct commissions' activities. In the state summaries, one would expect that complaints filed against judges or judicial candidates based on their campaign statements would be categorized under either "failure to recuse" or "improper political activity."

[17]Alabama: (1999-2000) 93%-94% complaints dismissed. *Ala. Jud. Inquiry Comm'n Ann. Rep.* at 16 (1999) & 16 (2000). Connecticut: (1997-2001) 97%-100% complaints dismissed or barred by statute of limitations. *Conn. Jud. Rev. Council Ann. Rep.* at 5 (1997), 7-8 (1998), 8-9 (1999), 8-9 (2000), 8-9 (2001). Texas: (1998-2001) 91%-93% complaints dismissed. *Texas Comm'n on Jud. Conduct Ann. Rep.* at 23 (2001). Utah: (1997-2001) 79%-89% complaints dismissed. *Utah Jud. Rev. Council Ann. Rep.* at 6 (1997), 6 (1998), 11 (1999), 8 (2000), 9 (2001). Wisconsin: (1996-2000) 85% initial inquiries dismissed. *Wis. Jud. Comm'n Case Disposition Table A-1* (visited Mar. 11, 2002) <http://www.courts.state.wi.us/judcom/CUMULATIVE%20TABLES.

recuse" or "improper political activity" are exceedingly low.[18]

V. The People Can Be Trusted to Elect Judges That Will Be Faithful to Their Oath.

The American people understand the dual role of judges: to make law when so authorized and to follow the law when required. *Williams v. United States*, 535 U.S. ___, 70 U.S.L.W. 3091, 2002 WL 334147 (2002) (Breyer, Scalia, Kennedy, JJ., dissenting from cert. denial) ("[T]he American public has understood the need and the importance of judges deciding important constitutional issues without regard to considerations of popularity."). It is true that "the devil is in the details." There is often vigorous debate among judges, lawyers, the people, and the press about whether a particular decision by a judge is faithful to the law or an unwarranted expression of a judge's own personal views contrary to the law.

That such a debate takes place, however, is a reflection of the fact that all understand the judge's dual role and that judges are accountable for the faithful performance of their duties. Those with life tenure are accountable ultimately to the

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html>; (1985-2000) 91.5% Commission investigations dismissed. *Table A-3. Id.*

[18]Alabama reports that 3%-4% of complaints in 1999 and 2000 were related to campaign conduct, while 6% of complaints during this time were related to failure to recuse. *Ala. Jud. Inquiry Comm'n Ann. Rep.* at 19 (1999) & 19 (2000). Michigan notes that .4%-2.5% of complaints were related to political activity during 1998-2000. *Mich. Jud. Tenure Comm'n Ann. Rep.* at 10 (1998), 10 (1999), 12-13 (2000). Lastly, Wisconsin has had 3 informal resolutions of partisan political activity in 15 years. *Wis. Jud. Comm'n Case Disposition Table A-3* (visited Mar. 11, 2002) <http://www.courts.state.wi.us/judcom/CUMULATIVE%20TABLES.html>.

judgment of history. Judges who stand for periodic elections are also subject to more immediate and concrete consequences. But judges are accountable -- and who can say with certainty that the judgment of historians should be preferred over the judgment of the people. For those judges subject to elections, however, the choice has been made: these judges are subject to the judgment of both historians and the people -- and the First Amendment guarantees that the people will have the information necessary to exercise that judgment. The announce clause unconstitutionally deprives them of that information.

CONCLUSION

Petitioners pray this Court to reverse the Eighth Circuit and hold the announce clause of Minnesota Judicial Canon 5A(3)(d)(i) unconstitutional under the First and Fourteenth Amendments.

Respectfully submitted,

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IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

KELLY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2, the Republican National Committee ("RNC") seeks leave to file a brief amicus curiae in support of the petition for certiorari. Counsel for Petitioners have given consent. Counsel for amicus attempted to obtain consent from counsel for Respondents by letter. These letters have not been returned

Believing that the brief itself fully establishes that a national political party is uniquely positioned to bring the court's attention to the nationwide implications of measures such as that in place in Minnesota, and the disparate impact those measures have on the equal protection of the national parties in the political process, the Republican National Committee respectfully requests that this Court grant leave for filing of the brief.

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BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

Amicus Curiae Republican National Committee ("RNC") is a national political party committee. The RNC is an unincorporated association that serves as the governing organization for the national political party. The RNC supports the candidates, issues, and principles of party. From endorsing candidates, to supporting candidates and party organizations, to organizing meetings and forums on various political, legal and policy issues, to sponsoring voter registration, education and turnout programs, the RNC is involved in a wide range of party-building activities.

The RNC promotes candidates in all fifty states for a myriad of state and local offices from the statehouse to the courthouse. The RNC is directly affected by any restriction, such as the Minnesota judicial canon, that prohibits candidates from seeking, accepting, or using political party endorsements, from attending or speaking at political gatherings, and from discussing contested legal and political issues. Simply put, the canons at issue severely limit the ability of the RNC to engage in the kind of political speech and association that it routinely promotes in other states, including fostering candidate debates and issues forums, and endorsing candidates for public office.

Although the canons at issue are directed at the candidates and not the parties themselves, this is a distinction

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae* and their members, made any monetary contribution to the preparation or submission of this brief.

without a difference. In races for elected office, the public is virtually always informed of a party's endorsement from the candidate – in the form of campaign leaflets, letters, television and radio advertisements, and speeches in which the candidate identifies himself with a political party. In addition, the total prohibition on a judicial candidate attending any function sponsored by a political party – no matter what its nature – directly impairs the party's ability to associate with like-minded candidates and promote the party's views on matters of public policy. As such, it is the party's speech as much as the candidate's that is harmed when a candidate's speech is silenced.

Because of the direct impact Minnesota's judicial canons have on the speech and associational rights of political parties, and because of the RNC's experience in supporting candidates for judicial office across the nation, Amicus is uniquely positioned to assist this Court in understanding the issues presented by the petition for certiorari.

SUMMARY OF ARGUMENT

In *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989), this Court affirmed the profound constitutional significance of political speech in the form of political party endorsements and involvement in campaigns for public office. Almost immediately following the Court's decision in *Eu*, however, those who firmly believe in stifling this form of speech sought to limit the holding of *Eu* to its narrowest possible sense – namely that the First Amendment prohibits a state from preventing a political party from endorsing candidates, but only in connection with *partisan* primary elections. The year following *Eu*, this Court granted certiorari in a case involving non-partisan elections. In *Renne* v. *Geary*, 501 U.S. 312 (1991), this Court reviewed a Ninth Circuit decision addressing the First Amendment concerns

raised by a California constitutional provision prohibiting political parties from endorsing candidates for nonpartisan office. Unfortunately, the Court discovered that the *Renne* case was a poor vehicle to address this important issue, and elected to dispose of the case on justifiability grounds. *Renne*, 501 U.S. at 320-24. This case presents the first good opportunity since *Renne* for this Court to address squarely the issue of whether political parties have less free speech rights in the context of nonpartisan rather than partisan elections.

The court below held that Minnesota had a compelling interest in promoting public confidence in the impartiality of its judiciary, that the judicial canons at issue served that interest, and that they were narrowly tailored to address the state's interest. In so doing, the court below opened a gulf in strict scrutiny analysis. Strict scrutiny ought require, as most courts have recognized, that the state's need for restrictions on speech be substantiated by record evidence, not simply philosophical musings. The need to preserve judicial impartiality was invoked as a mantra by the court below to justify its restrictions, but this claim is unsupported by the record. Strict scrutiny also ought require, as most courts have recognized, that the least restrictive means for addressing the state's need be adopted. The court below ignored many obvious less restrictive means for addressing the state's concern of maintaining the appearance of judicial impartiality and, as a result, applied strict scrutiny in a manner that was analytically indistinguishable from rational basis review. This Court should grant certiorari to clarify the appropriate application of strict scrutiny in this area, before other courts follow the Eighth Circuit's lead, and fundamental First Amendment speech and association rights are placed in jeopardy.

The rule announced by the court below is at once too narrow and too broad. It is too broad because it restricts far more speech by candidates and like-minded political

organizations than is necessary to preserve the appearance of judicial impartiality. Yet, at the same time, the interest in preserving the appearance of an impartial judiciary ought logically also extend to a candidate's seeking, accepting, or using endorsements made by special interest groups, other office-seekers, labor unions, local clubs, and even newspapers. Where fundamental rights of free speech, protected by strict scrutiny, are inhibited, the failure of the court below to bridge these logical gaps ought be fatal.

This Court has already recognized that the issue of whether a state may shackle the speech of a political party that wishes to speak in connection with an election for a "nonpartisan" office is one of "fundamental and far-reaching import." *Renne*, 501 U.S. at 324. The First Amendment safeguards our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). It assures an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. U.S.*, 354 U.S. 476, 484 (1957). Thus, the First Amendment "has its fullest and most urgent application" to campaign-related speech, *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), because "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (per curiam). Minnesota's efforts to "protect" the electorate from awareness of the endorsements of political parties is not only a path fraught with peril, but in the last analysis reduces to the type of paternalism that was squarely rejected by the Court in *Eu*. These restrictions contradict the very principle behind having elections – that the electorate be able to make an informed choice between contenders for office by knowing more, rather than less, about the candidates.

The limitations placed by Minnesota on the ability of candidates to attend and speak at political gatherings, the prohibition from announcing views on contested political and legal issues, and the prohibition against seeking and accepting party endorsements, directly restrict the ability of political parties to get their messages out before the general public and to keep the electorate informed. While many view any rule which keeps politics away from the judiciary as a good rule, this Court has never embraced such a rigid approach. Absent any showing of a compelling need to silence the speech of candidates – and none has been shown by the respondant – this Court should grant certiorai and reverse the decision of the court below, thus preserving the right of candidates and political parties to freely speak out and associate in connection with elections for judicial office.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT SPLIT BETWEEN THE CIRCUIT COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF ENDORSEMENT AND OTHER SPEECH BANS IN THE CONTEXT OF ELECTED OFFICES, AND THE OBVIOUS TENSION BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN *EU*.

When this Court granted certiorari to address the constitutionality of endorsement bans on candidates for judicial office ten years ago, there was not a deep split between the lower courts as to whether these types of bans were constitutional. The lower courts had uniformly held that such bans violated free speech. In *Abrams* v. *Reno*, 649 F.2d 342 (5th Cir. 1978), the Fifth Circuit invalidated a ban on political party endorsements in primary elections. In so doing, the court affirmed (without feeling the need for extended

commentary) the district court finding that "a substantial burden on First Amendment rights is presented" by the ban, which it determined constituted a "direct prior restraint on the exercise of free speech, the right to endorse or oppose; in sum, in the important right of free political expression." *Abrams* v. *Reno*, 452 F. Supp. 1166, 1169-70 (S.D. Fla. 1978). Indeed, the court went on to explain that such "legislative restrictions on advocacy of . . . candidates are wholly at odds with the guarantees of the First Amendment." *Id.* at 1170 (*quoting Buckley*, 424 U.S. at 1). In a single sentence, the court dismissed Florida's claim that it had a compelling interest in "preserving 'official neutrality' of party executive committees in primary elections." *Id.* In short, the court barely entertained the notion that "silence coerced by law, the argument of force in its worst form" should be given preeminence over "free political speech." *Id.* at 1171.

In another case from the Fifth Circuit, the district court invalidated a ban on political party endorsements in judicial races. *See Concerned Democrats* v. *Reno*, 458 F. Supp. 60 (S.D. Fla. 1978). In *Concerned Democrats*, the court granted a preliminary injunction to plaintiffs seeking to have the ban on endorsements overturned, stressing that "[t]he court believes that conduct which involves scrutinizing and endorsing of political candidates is within the core of the First Amendment." *Id.* at 64. The court seemed strongly influenced by the fact that "[e]ven though some state regulations of the election process are permissible and necessary, the Supreme Court has not hesitated to strike down election laws which interfere with a newspaper's right to comment on political candidates," and believed the analogy to political party activity was compelling. *Id.* Thus, the Fifth Circuit was largely uniform in invalidating bans of party endorsements of candidates.

Against this legal backdrop, and this Court's decision in *Eu* striking down a California law barring pre-primary

endorsements by political parties, the Ninth Circuit rendered its decision in *Renne*. In *Renne*, the Ninth Circuit struck down provisions prohibiting political parties from endorsing candidates for nonpartisan office on the grounds that they neither served a compelling state interest, nor were narrowly tailored to serving that goal. *Renne* v. *Geary*, 880 F.2d 1062 (9th Cir. 1990), *vacated and remanded on other grounds*, 501 U.S. 312 (1991)). Noting this Court's rejection in *Eu* of endorsement bans as paternalistic and offensive to democracy, the Ninth Circuit rejected the state's attempt to draw a distinction between elections for partisan and nonpartisan offices, explaining:

> [W]e observe . . . that there is nothing in this court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon the fact that partisan offices were at issue. The concern in both fora was with the State's abridgement of the rights of political parties and their members to exchange ideas and information, not with the nature of the elections at issue.

Id. at 285. The Ninth Circuit also found that the provision was fatally flawed because it was not narrowly tailored, explaining:

> The State claims that [the endorsement ban] is narrowly drawn because only political parties and their county central committees are prohibited from endorsing, supporting, or opposing nonpartisan candidates; individuals are not subject to its restrictions. But as we have noted . . . political parties as well as party adherents possess rights of expression and association under the first amendment, and the

> mere fact that [the ban] targets the collective rather than the individual voices of party members does not suffice to render it "precisely drawn."

Id. In other words, the value of political speech did not, in the Ninth Circuit's opinion, depend upon whether its *source was an association or an individual.* In addition, obvious less restrictive means for regulating the activity existed, including limits on the partisan activity of candidates for nonpartisan office that did not interfere with the ability of political parties to endorse the candidate. *See id.*

The Ninth Circuit's *en banc* decision, though in step with that of her sister circuit, was not without controversy. One spirited dissent urged that the state had a "super" compelling interest in being able to determine the structure of its own government, and because it was possible that the state might provide a limiting construction of the ban, that possibility would render it narrowly tailored. *See id.* at 286, 304 (Rymer, J., dissenting). A second dissent urged that the majority was ignoring the "devastating impact that party endorsement can have on the integrity of local office holders and on the independence of its judiciary." *Id.* at 305 (Alarcon, J., dissenting). Against this background of spirited disagreement between the lower court judges, this Court's decision to grant certiorari in *Renne* to review this nationally important decision, even prior to the development of a deep Circuit split, was no doubt seen as a welcome relief. With the issue left unaddressed in *Renne*, however, the groundwork was laid for the Eighth Circuit's decision in the instant case.

The decision of the court below, upholding a ban on candidates seeking, accepting, or using party endorsements, creates a deep split among the circuit courts of appeal over the constitutionality of attempts to limit a party's ability to endorse

and otherwise support candidates for nonpartisan offices. The court below rejected the approaches of the Fifth and Ninth Circuits, which found such bans served no legitimate compelling state interest and were not narrowly tailored. By contrast, the Eighth Circuit here found that the state had "shown compelling government interests" in "an independent and impartial judiciary" and in "preserving public confidence in that independence and impartiality." *Republican Party of Minnesota* v. *Kelly*, 247 F.3d 854, 867 (8th Cir. 2001). This is precisely the reasoning expressly rejected by the Ninth Circuit in *Renne*. The court here relied solely on newspaper editorials, affidavits from certain judges and politicians,[2] and "common sense," rather than substantive evidence, to determine that the restrictions at issue protected the state's interest. *Id.* at 871 (internal quotation omitted).

In finding that the endorsement ban was the least restrictive means of protecting this interest, the court below rejected less restrictive means of limiting the partisan activities of candidates, such as allowing the candidate to announce party affiliation only in response to a direct question, as is done in Kentucky, or allowing the candidate to discuss endorsements but not party affiliation, as is done by other states. *See id.* at 873. In so doing, the court also opened up a split with the Fifth Circuit cases, which held that these alternative means of protecting the states' interest sufficed.

The court below attempted to reconcile its decision with those of the Fifth Circuit by explaining that while the endorsement ban in the Fifth Circuit was one directed at political (or "third") parties, Minnesota's restriction was directed only at the candidate. This is a distinction without a

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2 The affiants broadly contended that they believed if the code were changed "judges would be under pressure to decide cases in ways that would impress the judge's supporters favorably, and eventually, partisanship would damage the public's confidence in the judiciary." *Id.* at 871.

constitutional difference. A party's right to endorse a candidate as a matter of free speech is meaningless if no one is aware of that endorsement or if the candidate is banned from choosing to associate with his or her political party. While dedicated party activists may be made aware of a political party's endorsement of a certain candidate from the party itself, the vast majority of voters and potential voters learn of a party's endorsement of a candidate directly from the candidate. The political party, in a very real sense, bespeaks its endorsement through the candidate. That symbiotic relationship has been explained:

> Our constitutional tradition is one in which political parties and their candidates make common cause in the exercise of political speech, which is subject to First Amendment protection. There is a practical identity of interests between parties and their candidates during an election.

California Democratic Party v. Jones, 530 U.S. 567, 589 (2000) (Kennedy, J. concurring). Consequently, as a factual matter, a ban on the seeking, acceptance, or use of a party endorsement by a candidate is tantamount to a ban on endorsements by the party itself. This Court has already struck down such bans in *Eu*.

Furthermore, even if Minnesota's restrictions directed at the candidate did not severely impair the ability of political parties to communicate their candidate endorsements to rank-and-file voters, this Court has always recognized that candidates for public office themselves enjoy the same speech and associational rights enjoyed by political parties:

> The candidate, no less than any other person, has a First Amendment right to engage in the

> discussion of public issues and vigorously and tirelessly to advocate his own election . . . . Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley, 424 U.S. at 52-53. If the importance of a candidate's rights to engage in advocacy during a campaign are of "particular importance," then a state's efforts to direct an endorsement ban at a candidate rather than a political party cannot be the very means by which the ban becomes constitutional.

In addition, the lower court's attempt to distinguish the decisions of other circuits simply cannot withstand scrutiny. Regardless of whether the endorsement ban is directed at political parties or the candidates themselves, it equally infringes on the rights of listeners. The First Amendment serves to protect the rights of listeners just as it does speakers. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). As the dissent in the court below noted, "a state may not hamstring voters seeking to inform themselves about the candidates and the campaign issues" because "it is simply not the function of government to select which issues are worth discussing or debating," and any attempt by a state to "enhanc[e] the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with . . . skepticism." *Republican Party of Minnesota*, 247 F.3d at 893 (Beam, J., dissenting) (internal quotations omitted). As this Court explained in *Tashjian* v. *Republican Party of Connecticut*, party labels and endorsements "provide a shorthand designation of the views of [the] candidates on matters of public concern," and therefore

they "play[] a role in the process by which voters inform themselves for the exercise of the franchise." 479 U.S. 208, 220 (1986). From the perspective of the rights of the listener, there is no difference between a ban on party endorsements directed at a candidate and one directed at a political party.

This split created by the Eighth Circuit extends beyond the context of endorsement bans to the very application of strict scrutiny itself. The dissent below took strong issue with the majority's test for determining whether Minnesota's canon was "necessary" to advance a compelling state interest. Under the dissent's view, the regulation at issue was fatally flawed because it was underinclusive – while prohibiting candidates from using political parties endorsements and attending party functions, it did not prevent the candidate from being endorsed by special interest groups or "consorting with organizations such as the National Organization of Women, the NAACP, the Christian Coalition, the National Association of Manufacturers, the AFL-CIO or the NRA." *See Republican Party of Minnesota*, 247 F.3d at 893 (Beam, J., dissenting) (noting that an appearance of partiality could be created by such contacts as easily as by one involving a political party). In addition, less restrictive means were available to protect the state's interest, such as the use of retention elections, public financing of judicial campaigns, lengthening judicial terms, or even providing generous pensions to alleviate financial pressure on judges. *See id.* at 902. For most courts, the existence of these less restrictive means would have led them, in their application of strict scrutiny, to strike down the provision.

The court below, however, found that the restrictions could be "narrowly tailored" within the meaning of strict scrutiny, notwithstanding these less restrictive alternatives, simply because the court claimed that (1) the Minnesota ban was "similar" to measures adopted by other states, and (2) "the authority of *Letter Carriers* and the other cases in which courts

have held it was proper to limit partisan political activity of executive employees." *Id.* at 873 (majority opinion). By ignoring the existence of less restrictive alternatives simply because they were "similar" to the prohibitions before it, the court split with the many decisions from other circuits that have invalidated state restrictions on this type of speech when less restrictive means exist. *See, e.g., S.O.C.* v. *Clark*, 152 F.3d 1136, 1147 (9th Cir. 1998) (county ordinance preventing all off-premises canvassing in City cannot stand where prohibition targeted at "problem areas" would have sufficed to protect the state's interest in aethestic streets); *Louisiana Debating and Literary Asso.* v. *City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995).[3] The Court should grant certiorari in this case to reinforce the application of strict scrutiny before other courts follow suit and erode fundamental First Amendment rights.

II. THIS CASE RAISES IMPORTANT ISSUES OF EQUAL PROTECTION

While the First Amendment concerns posed by this case are of paramount importance, this Court should also grant certiorari to address important issues raised by petitioner's Equal Protection challenge. When the court below virtually ignored petitioner's Equal Protection claim, it created serious tension with this Court's decision in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 121 S.Ct. 2351 (2001) ("*Colorado II*"), which reinforced that political parties may not constitutionally be

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3 The lower court's reliance on *Letter Carriers* is also unpersuasive. This Court in *Buckley* rejected the argument that an interest in having impartial office holders can justify a ban on endorsements in partisan elections. In *Buckley*, the government argued that *Letter Carriers* provided a sound basis for upholding a federal restriction on independent campaign expenditures during candidate elections. The Court held that the government's reliance on *Letter Carriers* was "mistaken[]," because *Letter Carriers* had specifically preserved the right of persons to express their opinions publicly during candidate elections. *See Buckley*, 424 U.S. at 48 n.54.

discriminated against in relation to other participants in the political process. *See Colorado II*, 121 S.Ct. at 2360. Absent further clarification from this Court, the precedent set by the decision below opens the door to state and local governments to place a wide range of limitations on the activities of political parties. This disfavored treatment is inconsistent with the history and development of democracy in America, which has shown that the activities of political parties should not be viewed with particular suspicion, especially in relation to other participants in the political arena.

While Canon 5 permits candidates to freely consort with politically active organizations such as the NRA, NAACP, the Minnesota Trial lawyers Association, labor unions, the Christian Coalition, and the like, it forbids judicial candidates from attending or speaking at political party gatherings or seeking, accepting, or using the endorsement of such groups. In upholding Canon 5, the court below ignored the recent statements from this Court that political parties may not be unfairly singled out for disfavored treatment. All nine Justices made clear in *Colorado II* that Congress may not place political parties in a disfavored position *vis a vis* other participants in the political process. In fact, it was the reality that individuals and special interest groups actively participate in politics in a manner indistinguishable from political parties that led the majority of the Court to uphold the coordinated spending limits that were at issue in that case. As Justice Souter explained, there is "no reason to see...[political party activities] as more likely to serve or be seen as instruments of corruption than [activities] by anyone else." *Colorado II*, 121 S.Ct. at 2352. The Court continued, "A party is not . . . in a unique position. It is in the same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid . . . . " *Id. at 2356.*

Other courts have recognized that the Constitution requires political parties to be accorded the same free speech rights as other politically-active organizations, absent a compelling cause for differential treatment. In *Republican*

Party of Minnesota v. *Pauly*, 1999 WL 731003 (D. Minn. 1999), the court explained why according full free speech protection to a political party was essential for the development of democracy:

> A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees. We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction.

1999 WL 731033 at **6. If the court of appeals below discovered a compelling interest rooted in a special danger of corruption posed by political parties but not other groups, it kept that interest well hidden. The court of appeals decision is wholly at odds with this Court's ruling in *Colorado II* and creates serious equal protection concerns. On this basis alone, this Court should grant certiorari.

III. THE ISSUES PRESENTED BY THIS CASE ARE OF NATIONAL IMPORTANCE AND ARE WORTHY OF THIS COURT'S ATTENTION

The decision of the court below poses a direct threat to the free discourse of political and legal ideas and requires immediate attention from this Court in order to preserve the

ordered nature of our democracy. The circuit split, as well as the spirited dissents in *Renne* and the instant case, demonstrate poignantly the absence of a consistent approach for dealing with free speech challenges to measures designed (at least ostensibly) to preserve the independence of nonpartisan offices. The confusion over this issue is not limited to the federal Courts of Appeals. In the years following *Renne*, states have adopted a wide variety of different measures designed to limit the free flow of information in the context of judicial elections. *See, e.g., Renne*, 247 F.3d at 873 n.18. Florida has placed limits on judicial candidates meeting at political gatherings. Fla. Code of Jud. Conduct Canon 7(c)(3). Other states have adopted more limited restrictions on the candidate's use of a party affiliation or endorsement. *See, e.g.*, Ky Sup.Ct.R. 4.300, Canon 5(A)(2), S.D. Code of Jud. Conduct Canon 5(C)(1)(a)(ii). The decision below is far from being an isolated fact intensive ruling. The number of states that have imposed these restrictions in one form or another renders this case of national importance. Absent this Court's intervention, states may be tempted to adopt even more speech-restrictive measures in the future.

The ban at issue in this case is extremely broad. It prevents candidates not only from accepting or using party endorsements, but also from attending or speaking at party sponsored events, no matter what their nature. The party cannot host a debate or other forum for the electorate so that the voters can determine for themselves the difference between the candidates' judicial philosophies, cannot provide a venue for the candidate to express his or her own views, cannot even so much as introduce a candidate at a function so the voters can learn what the candidate looks like.[4] Simultaneously, the

[4] Many political parties routinely hold issue forums where candidates and elected public officials come together and discuss their views on matters of public policy. Minnesota's canon would bar any judicial candidate from attending such a forum, no matter how the forum was structured or what was discussed. On this basis alone the Court should grant certiorari to review the extraordinary constitutional concerns that are implicated here.

ban does nothing to prevent special interest groups such as abortion and anti-abortion activists from doing precisely what political parties are barred from doing, which raises serious equal protection and overbreadth concerns.

If free speech jurisprudence has one fundamental tenet, it is this: the free flow of information is always preferred over measures designed to prevent voters from learning information "for their own good." *See, e.g., Eu*, 489 U.S. at 223-24 (finding it "particularly egregious where the State censors the political speech a party shares with its members."). The preferred remedy to disfavored speech is, and always has been, counter-speech, not wholesale suppression. In leaping forward to suppress all candidate and party speech which it considers to be dangerous, Minnesota has opened the door to greater evils than those it sought to prevent.

The state of Minnesota can protect its judiciary from the appearance of undue political influence by simply making judgeships appointed offices. However, having decided to elect judges, Minnesota cannot constitutionally limit the rights of candidates, like-minded organizations, political parties, and voters to discuss the issues of concern relating to the judicial offices the candidates seek. Moreover, Minnesota cannot single out one group such as a political party whose speech it disfavors and prevent judicial candidates from referring to that group's views.

CONCLUSION

When this Court failed to address the "fundamental and far-reaching" free speech issues raised by bans on party endorsements in *Renne*, this Court explained, "we cannot decide the case based upon the amorphous and ill-defined factual record presented to us." 501 U.S. at 324. Before the Court today is the same issue, squarely presented and with a

complete record. For this reason and for the reasons set out above, Amicus Curiae respectfully request that the petition for writ of certiorari be granted.

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IN THE
Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

VERNA KELLY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a non-profit advocacy group with more than 150,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues, including campaign finance reform and preservation of the state-law civil justice system. Of particular relevance to this case, Public Citizen attorneys represented plaintiffs in a case challenging the Texas system for financing campaigns for judicial elections. The case was premised on the theory that the Texas system—which allows large campaign contributions by lawyers and others with interests before the courts but does not require recusal of judges when contributors appear before them—creates an appearance that judges are not impartial, in violation of litigants' due process rights. The Fifth Circuit recently held that the plaintiffs in that case lacked standing. *See Public Citizen v. Bomer*, No. 00-51009 (5th Cir. Nov. 26, 2001). Public Citizen also filed an amicus curiae brief in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). Moreover, Public Citizen lobbyists are active on issues involving campaign finance reform. Thus, Public Citizen has a long-standing interest in the issue presented in this case.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Canon 5A(3)(d)(i) of the Minnesota Code of Judicial Conduct provides, among other things, that no judge or

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that no party had any role in writing this brief and that no one other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed with the consent of the parties, as documented in a letter filed by Petitioner's counsel and signed by counsel for both parties.

candidate for judicial office shall "announce his or her views on disputed legal or political issues." This Canon, as revised by the Supreme Court of Minnesota in 1996, is intended to further the State's interests "in an independent and impartial judiciary" and "in preserving the public's confidence in that independence and impartiality." *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 867 (8th Cir. 2001). Public Citizen agrees with the lower court's finding that these interests are compelling. Public Citizen disagrees, however, that the speech restriction imposed by Canon 5's "announce" clause is narrowly tailored to serve that interest.

The wisdom of choosing a judiciary by election is often questioned. *See, e.g.*, Texas Supreme Court Chief Justice Thomas Phillips, State of the Judiciary (Address to the 76th Legislature March 1999); Citizens for Independent Courts, Choosing Justice: Reforming the Selection of State Judges 1 (1999); ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates 3 (1998). Public Citizen is sympathetic to the criticism of judicial elections. Requiring judges to campaign for their posts—and in particular to seek and accept campaign contributions—while at the same time calling upon them to perform their judicial function impartially creates a conflict that is difficult to reconcile. Moreover, the public certainly has cause to question whether judges who solicit contributions from lawyers appearing before them and parties with interests before the courts can in fact serve as neutral arbiters. *See* National Center for State Courts, How The Public Views The State Courts, A 1999 National Survey 42 (May 1999) (78% of public surveyed agreed that having to raise campaign funds influences elected judges).

The Minnesota Supreme Court, in issuing Canon 5, correctly recognized that the State's system for choosing its

judges threatens litigants' due process right to judges who are and appear to be impartial. Nonetheless, in attempting to protect the legitimate interest in an impartial judiciary, the Court has fashioned a rule that runs roughshod over candidates' First Amendment rights. Canon 5 unnecessarily pits two constitutional imperatives—due process and free speech—against one another. The proper resolution of the conflict between an elected judiciary and an impartial judiciary, however, is not a blanket rule forbidding candidates from speaking about substantive matters. Rather, the State should use other available means to ensure that judicial decisionmaking is impartial and that the public perceives it to be so. Although Minnesota has some such protections in place, it has thus far neglected to address one of the most significant threats to the fact and appearance of impartiality: unrestricted contributions by lawyers and parties with actions or interests before the judges to whom they are contributing.

If Minnesota's electorate believed that the only relevant criteria for selecting judges were the candidates' resumes and photographs, it would be hard to justify the time and expense of electing judges. The decision to elect judges, however, derives from a recognition that any selection process will involve political concerns and a desire to keep the political choice in the hands of the electorate. *See Republican Party of Minn. v. Kelly*, 247 F.2d at 888-89 (Beam, J., dissenting). If Minnesota had chosen a gubernatorial appointment system, the First Amendment would surely not permit the State to prohibit a potential judge from discussing his or her judicial philosophy, controversial legal issues, and political views with the governor or his staff. The choice to select state judges by election, whether or not wise, does not justify infringing the right of judicial candidates to discuss their views with those who will make the selection.

At the same time, not all speech restrictions run afoul of the First Amendment. As this Court has recognized, a state may lawfully prohibit candidates for judicial office from making promises that represent quid pro quo arrangements and may limit campaign contributions. In comparison to Canon 5's "announce clause," these restrictions are better tailored to protect the fact and appearance of judicial impartiality.

Indeed, Canon 5's "announce" clause is particularly ill-suited to serve the interest for which it was intended. Although it forbids candidates from speaking about "disputed legal and political issues," the "announce" clause cannot practically restrain incumbent judicial candidates from addressing such topics in the course of issuing opinions and performing other judicial duties. This inequity further illustrates the unconstitutionality of the "announce" clause.

ARGUMENT

Canon 5's "announce" clause is intended to serve the compelling interests of neutral application of the law and ensuring the public's faith in the impartiality of the judiciary. *See Republican Party of Minn. v. Kelly*, 247 F.3d at 864, 867. "Trial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted). As this Court has observed:

> The requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus*, 435 U.S. 247 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). "[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508 U.S. at 618 (citing *Marshall v. Jerrico*, 446 U.S. at 243). The Due Process Clause forbids even the "possible temptation to the average man as judge" not to be neutral and detached. *Concrete Pipe & Prods.*, 508 U.S. at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)).

Canon 5, however, is a poor means of serving the interest in a judiciary that is and appears to be impartial. The "announce" clause imposes a restriction on political speech that, as the Eighth Circuit recognized, lies at the core of First

Amendment freedoms. *Republican Party of Minn. v. Kelly*, 247 F.3d at 861 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989)). States have many other means at their disposal to protect the independence of the judiciary. Particularly in light of Minnesota's failure to use one of the tools best calibrated to achieving the State's purpose—campaign contribution limits—the availability of other means of serving the State's objective renders the "announce" clause impermissible under the First Amendment. Moreover, Canon 5's "announce" clause imposes inequitable restrictions on the challenger as opposed to the incumbent and, in that way, fails to serve its intended purpose.

1. The numerous means—short of restricting protected speech—available to protect against judicial partiality demonstrate that Canon 5's "announce" clause violates the First Amendment. *See United States v. Playboy Entertainment Group*, 529 U.S. 803, 815 (2000) ("[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.").

In Minnesota, for instance, protections against the fact or appearance of partiality are provided by procedural rules and by statute. Minnesota Rule of Civil Procedure 63.02 provides: "No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror." In addition, parties may move for disqualification of a judge as a matter of right by serving a notice to remove on the opposing party and filing the notice with the court administrator. Minn. R. Civ. P. 63.03. Thus, if a judicial candidate's "announcement" of his or her views goes so far as to suggest that he or she cannot preside impartially over a given case ("I think Company X has been violating our State's antitrust laws for 10 years."), the Rules of Civil Procedure provide a precisely tailored mechanism for protecting

the due process right, without infringing protected speech. In contrast, because not every "announcement" on a "disputed legal or political issue" threatens a judge's impartiality, *see Laird v. Tatum*, 409 U.S. 824 (1972), the proscription of Canon 5's "announce" clause is overly broad.

Furthermore, the doctrine of stare decisis, the right to appeal, and the lower courts' duty to obey the pronouncements of the higher courts offer powerful protection against biased decisionmaking at the lower court levels. The use of multiple-judge panels on appeal also helps to ensure that one judge's preconceived views, as opposed to the advocates' presentations, do not control the outcome of a case.

In addition to the "announce" clause, Canon 5A(3)(d)(i) contains prohibitions on a candidate "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; . . . or misrepresent[ing] his or her identity, qualifications, present position or other fact, or those of the opponent." If the "pledge" clause were interpreted to prohibit general "pledges" —"I promise to be tough on drug dealers"—it too would be overbroad, as such pledges do not meaningfully differ from "announcements." ("I believe judges should be tough on drug dealers.") However, to the extent that it prohibits pledges or promises that offer or represent quid pro quo arrangements, the "pledge" clause serves the State's interest better than the "announce" clause, as it is more narrowly tailored to serve the State's interest in decisionmaking that both is and appears to be neutral. *See FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."). A state statute provides further protection against such conduct. *See* Minn. Stat. § 211B.13 (promise made to induce voter to vote in particular way constitutes felony).

Along the same lines, restrictions on judicial candidates' ability to make promises in exchange for campaign contributions protect the independence of the judiciary. Thus, most states, attempting to insulate judges from knowledge of their contributors, do not allow judicial candidates personally to solicit campaign contributions. ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates 40-41 n.73 (1998). Minnesota goes further than most states, as Canon 5B(2) prohibits a judicial candidate's campaign committee from disclosing to the candidate either the names of those who contribute or the names of those solicited. The First Amendment permits this sort of restriction, which removes the specter of bribery from judicial decisionmaking.

The First Amendment also permits limits on campaign contributions. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000); *Buckley v. Valeo*, 424 U.S. 1 (1976); *see id.* at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."). Campaign contributions pose a far greater threat to judicial independence than do candidates' announcements of their views on legal and political issues. *See* Minn. Supreme Court, 1999-2000 Public Opinion of the Courts Study, Executive Summary at 5, available at www.courts. state.mn.us (68% of respondents think elected judges are influenced by having to raise campaign funds); *see also* Call To Action, Statement of the National Summit on Improving Judicial Selection (Jan. 25, 2001) (recommending campaign finance reform and other ways of improving judicial elections as formulated at national summit convened by Texas Supreme Court Chief Justice Thomas Phillips and Texas Senator Rodney Ellis).

In Texas, for example, the parties and lawyers involved in the 12 cases heard by the state supreme court in November 2001 had contributed $1,603,409 to the nine justices. The parties and lawyers involved in the nine cases heard in September 2001 had contributed $1,449,329 to the justices. Texans for Public Justice, Dollar Docket (Dec. 12, 2001; Oct. 3, 2001), available at www.tpj.org/payola/docket.html. Law firms and lawyers accounted for 50 percent or more of the contributions received by each of the four supreme court justices who ran in 1998. Texans For Public Justice, Checks & Imbalances: How the Texas Supreme Court Raised $11 Million, Part VI at I-2 (April 11, 2000). Business and PAC contributions accounted for another 15 to 17 percent of the money raised by those four candidates. *Id.* Such facts have a clear negative effect on the public's perception of the judiciary. A 1999 survey conducted by the Texas Office of Court Administration and the State Bar of Texas found that 83 percent of the respondents believed that campaign contributions have a "very significant" or "somewhat significant" influence on judges' decisions. Supreme Court of Texas, Judicial Campaign Finance Study Committee, Report and Recommendations 4 (Feb. 23, 1999). A study sponsored by the Supreme Court of Texas showed that a majority of judges, lawyers, and court personnel perceive the same unseemly influence. *See* Supreme Court of Texas, The Courts and The Legal Profession in Texas—The Insider's Perspective 19, 36, 54 (May 1999).[2]

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[2] Although in 1995 Texas sought to eliminate the appearance of "justice for sale" by enacting limits on judicial campaign contributions, its $5,000 limit on an individual's contribution to each candidate for statewide judicial election, 15 Tex. Elec. Code Ann. § 253.155—which is 5 times higher than

(continued...)

Perversely, Minnesota's "announce" clause may increase the dependence of the judiciary on campaign contributions. For without the ability to distinguish themselves through substantive discussion, candidates are forced to rely more heavily on name recognition and other non-substantive campaign tools. *Cf. Geary v. Renne*, 911 F.2d 280, 292 (9th Cir. 1990) (Reinhardt, J., concurring) ("In actuality, the prohibition of endorsements appears to be counterproductive, for it *increases* the dependence of the judiciary on campaign contributions."), *vacated on other grounds*, 501 U.S. 312 (1991).

In contrast to restrictions on permissible topics of speech, limits on campaign contributions can be fashioned without "undermin[ing] to any material degree the potential for robust and effective discussion of candidates and campaign issues. . . ." *Buckley*, 424 U.S. at 29. Accordingly, the First Amendment provides less protection to campaign contributions than to the core First Amendment speech restricted by Canon 5's "announce" clause. *See id.* at 23, 29. Minnesota, however, does not limit individuals' contributions to judicial election campaigns. *But cf.* Minn. Stat. § 211B.15, subd. 2 (prohibition on corporate contributions); Minn Stat. § 10A.27 (contribution limits for certain executive and legislative offices); Minn. Stat. § 10A.25 (expenditure limits for certain executive and legislative offices). Having chosen to forgo limits on campaign contributions—a lesser form of speech and a more direct threat to judicial independence—Minnesota cannot permissibly restrict the core speech at issue here. *See Playboy Entertainment Group*, 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is

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[2](...continued)
the limit on contributions to candidates for president, *see* 2 U.S.C. § 441a(a)(1)(A)—did little to alleviate the problem.

the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").

2. The "announce" clause restriction also works inequitably. Whereas the incumbent judicial candidates regularly "announce" their views through orders, opinions, and other statements made in the course of their work, challengers are forbidden from sharing their views on those same issues. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (law cannot "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). For example, Canon 5 bars candidates from stating their views on a facial challenge to the constitutionality of a state law, on the death penalty, or on other disputed legal matters as to which one would likely have a view apart from the facts of a particular case. Thus, although Canon 5 nominally applies to incumbent candidates, in fact incumbents are permitted, through their decisions, to make otherwise prohibited "announcements," and may even add dicta to go beyond what they must say to decide a particular matter or issue. Canon 5 thus tilts the playing field in favor of incumbents, the only candidates with the means to speak substantively. In fact, by barring the challenger from both raising issues and responding to the incumbent's pronouncements, Canon 5 creates a situation in which the electorate knows the views only of the incumbent. In this way, the sitting judges responsible for the Code of Judicial Conduct have in effect thwarted the will of the people of Minnesota by converting a system of contested elections into a system of retention elections.

For this reason, among others, Canon 5 does not serve even its intended purpose of protecting the independence and impartiality of the judiciary. If a judge has a preconceived view on some legal or political issue, it strains logic to suggest that the judiciary is more independent or impartial simply because the

judge, as candidate, is compelled to remain silent. The public's right to a judiciary that both is and appears to be impartial does not warrant elevating illusion over reality. One cannot reasonably argue that a litigant is better off before a judge who is predisposed against his or her position if the individual does not know the judge's predisposition than if he or she does know it. Indeed, the litigant is surely better off knowing, either because he or she can use that knowledge to help frame his or her case most effectively to address the judge's concerns or because, if the judge's "announcement" suggests that the judge cannot consider the case impartially, the litigant can invoke the recusal rules.

The Eighth Circuit expressed concern that, if a candidate announced a view, the candidate would then feel more tightly bound to that position than if he or she had not stated it aloud. *Republican Party of Minn. v. Kelly*, 247 F.2d at 878. Amicus is not aware of any evidence on this point. On the other hand, common experience teaches that candidates for other elective offices frequently reverse themselves on campaign pledges once they are elected. (*E.g.*, "Read my lips. No new taxes.") We know of no reason to believe that judges, who are generally in the public spotlight less than are many other elected officials, will feel any more constrained by their campaign statements regarding legal and political issues. In fact, history offers examples of judges who staked out views on issues and later, when considering cases presenting the issues, authored opinions at odds with their previously stated views. *See, e.g.*, *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from the denial of certiorari); *McGrath v. Kristensen*, 340 U.S. 162, 176-78 (1950) (Jackson, J., concurring, and citing cases) ("The matter does not appear to me now as it appears to have appeared to me then.") (citation omitted).

In any event, as an effort to prevent judges and prospective judges from feeling bound to a particular position, the "announce" clause is ineffective and discriminatory. It does not prevent judges or prospective judges from staking out positions via judicial opinions, legal briefs or arguments, law review articles, op-ed pieces, books, or speeches that predate the declaration of candidacy. Rather, Canon 5 targets only speech during the term of an individual's candidacy—in other words, pure political speech. Ironically, this form of speech is the one subject to the highest degree of First Amendment protection.

CONCLUSION

For the foregoing reasons, the Eighth Circuit's holding that Canon 5's "announce" clause is constitutional should be reversed.

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BRIEF OF AMICI CURIAE STATE SUPREME COURT JUSTICES IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Petitioners,

v.

KELLY, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

INTEREST OF AMICI CURIAE[1]

The Honorable Clifford Taylor is an Associate Justice on the Michigan Supreme Court. He was appointed to that court in 1997, and that appointment was confirmed by election in 1998. He was reelected to an eight-year term in 2000. As a past and potential future candidate for elective judicial office, and as a current state supreme court jurist, Justice Taylor brings to this Court a valuable perspective on the interests of both candidates and the judiciary.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

The Honorable Richard B. Sanders is a Justice on the Washington Supreme Court. He took his seat on that court after winning a special election in 1995 and was reelected to a six-year term in 1998. Between his two elections Justice Sanders encountered political criticism and faced legal challenges for a speech regarding a controversial issue. He ultimately prevailed in defending his speech, both at the polls and in the courts. He thus brings to this Court a unique perspective on the interaction between judicial speech and judicial ethics in an elective system.

STATEMENT

Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct states, in part, that a candidate for judicial office shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his or her views on disputed legal or political issues." Only the latter "announce" clause is challenged before this Court. Canon 5(A)(3)(a) and (c) further require the candidate to encourage family members to adhere to the same standards of political conduct as the candidate and forbid the candidate from authorizing or knowingly permitting any other person "to do for the candidate what the candidate is prohibited from doing" for him or herself.

The conduct at issue on certiorari involves petitioner Wersal's announcement, during the course of a campaign for a seat on the Minnesota Supreme Court, that he was in favor of strict judicial construction and his criticism of certain Minnesota Supreme Court decisions. Pet. 4. His wife, his brother, and associates and members of his campaign committee also spoke in favor of his candidacy and announced his views in favor of strict construction and against some Minnesota Supreme Court decisions. *Id.* 4-5.

Out of concern that those statements and certain other conduct violated Canon 5, petitioners brought a challenge to Canon 5's announce clause and its separate provisions – no

longer at issue before this Court – concerning activities involving political parties. Regarding the challenge to the announce clause, the district court construed the clause to apply only to matters likely to come before the candidate if elected as judge and held that Canon 5 advanced Minnesota's compelling interest in the independence and integrity of its judiciary. *Republican Party of Minnesota* v. *Kelly*, 63 F. Supp.2d 967, 985-86 (D. Minn. 1998).

The Eighth Circuit affirmed in a split decision, accepting the district court's narrowing construction of the announce clause and finding that, so construed, it was narrowly tailored to serve the Minnesota Supreme Court's compelling interest "to guarantee the independence of the Minnesota judiciary" from "'political, economic and social pressure.'" *Republican Party of Minnesota* v. *Kelly*, 247 F.3d 854, 864-65 (CA8 2001) (citation omitted).

Because thirty-four states select their judiciaries in whole or in part through popular election, the issue in this case is of national interest. The jurists appearing as *amici* on this brief both come from states that elect members of their judiciary, and thus have a particular interest in the reconciliation between the Canons and the First Amendment.

SUMMARY OF ARGUMENT

Two central facts about the judiciaries in Minnesota and in thirty-three other states must necessarily dominate the First Amendment analysis in this case. First, jurists in Minnesota and other states are subject to recurring elections and thus are dependent on the electorate for their continued tenure in office. Second, state courts, unlike their federal counterparts, play a central role in making, not merely interpreting, the law. While those facts may seem obvious, they have far-reaching and frequently ignored implications regarding the nature of state judiciaries.

The fact of recurring judicial elections introduces political accountability into a branch of government that, at the federal

level, is thought of mostly in terms of isolation and independence from such matters. Such a dramatic departure from the federal model necessarily rejects, at least in part, the notion of a fully independent judiciary and suggests that a certain degree of political responsiveness is not only permissible, but is an intrinsic and expected element of the elective judicial role.

The fact that state courts play a greater role than federal courts in the creation of substantive law explains, in part, why many states have opted for a more responsive, rather than isolated, judiciary. The authority, responsibility, and discretion inherent in developing the common law are perhaps the most significant law-making functions of state courts, and add a distinctly legislative character to state judiciaries. While state courts also have the simultaneous task of faithfully interpreting and applying authoritative law – constitutions, statutes, and regulations – made by others, their common-law-making function necessarily imposes upon them a degree of discretion in making policy choices that are political in a very basic sense of the word. It should hardly be surprising, therefore, that with such a mixed role for state courts, many states have rejected the federal model of a politically insulated judiciary and instead have opened their judiciaries up to periodic public input and influence through recurring elections.

The central facts of recurring elections and state judicial law making both increase the propriety and importance of judicial speech regarding issues on which courts exercise discretion and decrease the significance of judicial independence from public influence regarding such issues. While it remains true even in elected judiciaries that judges must be independent and impartial as to the facts and the litigants in individual cases, and ought not, therefore, make promises of how they will decide particular cases, that aspect of independence is not implicated by a ban on candidates announcing their views on legal *issues*. And although a jurist ought not *commit* to deciding even a legal issue a certain way – because it suggests improper refusal to consider contrary arguments – expressing views on legal issues is a far cry from such a commitment.

While judicial candidates should not be allowed to promise to violate their oaths – either by disobeying binding law or by refusing to consider the arguments of the parties – they should be protected by the First Amendment when expressing their views regarding issues on which jurists might differ in the exercise of their lawful discretion and judgment. For if reasonable jurists might differ over matters ultimately within their discretion, then the voters might likewise differ over who they want exercising discretion over such issues. The electorate thus has a vital constitutional interest in knowing the views of judicial candidates on issues over which they will have discretion, and the candidates have a vital constitutional interest in seeing that their views are conveyed to the public accurately and as the candidates think best.

ARGUMENT

I. STRICT SCRUTINY IS APPROPRIATE.

The Eighth Circuit recognized that Canon 5's announce clause is a content-based restriction on political speech at the heart of an election campaign, and is thus subject to strict scrutiny. 247 F.3d at 864. *Amici* agree that full and rigorous strict scrutiny is appropriate in this case. There is no question that forbidding a candidate for judicial office from announcing his or her views on disputed issues (especially those likely to come before the court, and hence uniquely relevant to any election) is a severe burden on the First Amendment rights both of the candidate and the public.

Amici do take issue, however, with the Eighth Circuit's seeming attempt to dilute the rigor with which strict scrutiny was applied, and in particular with the court of appeals' suggestion that a strong government interest in judicial impartiality and integrity somehow lowers the standard of scrutiny it-

self. 247 F.3d at 862. Although the court of appeals may well be correct that certain differences between the judiciary and the legislative and executive branches "bear on the strength of the state's interest" in restricting certain types of judicial speech, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (CA7 1993); *In re Chmura*, 608 N.W.2d 31, 40 (Mich.), *cert. denied*, 531 U.S. 828 (2000), that difference in state interest is fully taken into account in the balancing process of strict scrutiny itself, and is no excuse for peremptorily diluting the standard of review.

II. Recurring Elections and the Common Law Fundamentally Alter the Traditional Federal Conception of the Judicial Function.

When evaluating both the burden on First Amendment rights and the state interests in this case, it is important to bear in mind the inevitable implications of recurring popular election as a means of selecting or retaining members of a state judiciary. The recurring election of jurists is such a fundamental departure from the federal model that it is often a mistake to adopt federal norms as the standard for jurists in an elective system. Instead, elections create their own baseline norms about the proper role of elected jurists, the nature and scope of judicial independence, and the requirements of judicial integrity. While in some instances such norms may be similar to those in the federal system, in many instances they are quite different. The federal model of isolation and reticence makes far less sense in the context of a judiciary that is intentionally subject to the public check of elections and thus, by definition, must be responsive to public views regarding the proper direction of the law and the judicial process.

The unique role of state courts in creating the common law likewise has a profound impact on the First Amendment analysis in this case. Unlike the federal courts, which primarily focus on interpreting rules created by the Constitution, statutes, and regulations, state courts have the added power

and responsibility to *create* substantive rules governing behavior across a wide spectrum of daily life. *Cf. Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal common law. * * * And no clause in the Constitution purports to confer such a power upon the federal courts."). Common-law rules on topics such as negligence, product liability, contracts, business organization, and damages necessarily reflect an exercise of discretion regarding values and policy choices that can only be described as political. The inevitable and proper role of such values and policy choices in the common law and in other aspects of state judicial decision making explains, in part, why many states have rejected a model of extreme judicial independence and instead chosen recurring elections as a means of ensuring significant public influence over the make-up of their courts and the inclinations of their jurists. For where decisions reflect, not merely the application of external rules to individualized disputes, but also the discretionary formulation of new rules of widespread precedential force, the public has a valid interest in knowing the values and inclinations of those jurists who will be making the law, and in selecting their judicial lawmakers according to the values and inclinations they bring to their jobs.

A. Electoral Accountability Restricts the Concept of Judicial Independence.

Whatever the merit of the federal ideal of a wholly independent judiciary, elected state courts, by design, are *not* independent of the electorate. The very point of elections is to make jurists accountable for their decisions by subjecting them to repeated tests at the ballot box. As the Michigan Supreme Court has observed, one "rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of individual judges in contributing to that direction." *In re Chmura*, 608 N.W.2d at 42. A necessary corollary to that rationale is that the public has a legitimate interest in hearing the views of candidates on such issues and may take account

of those views when they vote. Accountability in state judicial systems is thus a significant departure from the federal model of initial political appointment followed by near impenetrable independence from further political influence.

By choosing to elect their judiciaries, the majority of states have eschewed the independence ideal and instead made jurists directly dependent upon the public for their future tenure. Although such dependence does not mean that elected jurists are expected to respond to public opinion in all matters,[2] it necessarily does mean that they are expected to at least take into account public sentiment on matters that involve policy- or value-based discretion, construction, or common-law creation.

While such accountability may seem jarring to lawyers and judges accustomed to the federal system, the significant law-making authority of state courts is a difference from the federal system that elevates the importance of accountability to the public and substantially alters the notion of judicial "independence" in state courts. This Court thus should resist relying on familiar norms of judicial independence from the federal courts and give thorough consideration to the struc-

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[2] It remains true, of course, that jurists must *apply* legal rules – whether legislative or court-made – impartially in each case and independent of public sentiment regarding the parties or the facts. And the very existence of elections seems to create pressure that threatens or appears to threaten impartiality and independence regarding those aspects of judging. It is precisely that concern that led the Framers of the federal Constitution to reject popular election of the judiciary. *See The Federalist No. 78*, at 471 (Hamilton) (Rossiter ed. 1961) (periodic election of judges creates "too great a disposition to consult popularity" when rendering decisions). Minnesota has made a different choice. States opting for an elected judiciary have, by definition, subordinated such intrinsic concerns raised by elections to the competing interest in accountability as to other aspects of the judicial function. The choice suggests considerable confidence both in jurists and in the public to distinguish between the elements of judging legitimately subject to public influence and accountability and the elements that must remain independent of external influence.

tural and conceptual limits on judicial independence that flow from the existence of recurring elections and enhanced law-making authority.

B. Impartiality as to Persons, Groups, and Facts.

There is no doubt that an essential characteristic of the judicial function, in both elective and appointive systems, is the impartial *application* of the law to individual cases. But impartiality in that context means deciding cases on the evidence presented without improper bias for or against the particular litigants. Personal favor or animus towards particular person or groups, or prejudgment of the facts of the case apart from the evidence presented, are the types of bias that are incompatible with judicial impartiality.

Notwithstanding the need for jurists to approach cases with an open and unbiased mind, judicial impartiality does not require a lack of knowledge or opinions about disputed legal questions or jurisprudential models that might arise in future cases. Judges are not expected to come to every case with a *totally* empty mind, and there is no expectation that judges must be impartial to ideas and legal issues. In fact, the near universal expectation of jurists is precisely the opposite – judges are expected to be knowledgeable and experienced in the law, which generally equates with having formed at least *some* opinions about the law and about various disputed legal issues. *See Laird* v. *Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., Memorandum regarding motion to disqualify) ("It would be not merely unusual, but extraordinary, if [most Justices] had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.").

Judges also are expected to interpret the law correctly regardless of whether the particular parties succeed in identifying such a correct interpretation. *See United States Nat'l Bank*

of Or. v. *Independent Ins. Agents of Am., Inc.,* 508 U.S. 439, 446 (1993) ("'When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'") (citation omitted). It would be difficult to correctly explicate the law without reliance on a pre-existing background of knowledge and opinion regarding various legal issues and the judicial process in general.

In the creation of common law, in particular, it is both necessary and proper for jurists to have a pre-existing substantive and jurisprudential framework. While the creation of common-law rules certainly takes place in the context of individualized cases, it undeniably is done with an eye toward the larger class of cases that will be controlled by the rules being announced. Taking into account basic values, policy concerns, and opinions when formulating such rules does not reflect partiality or improper bias towards the litigants. Rather, it reflects judgment, experience, and a recognition that judges are more than mere arbitrators of private disputes – they are often the makers of public law. Impartiality comes not from the absence of opinions on legal issues, but rather from the even-handed application of the rules jurists develop based on their opinions as sharpened and challenged, though not defined, by the adversary process in individual cases and across a body of cases.

C. Judicial Integrity Can Co-Exist with a Functioning System of Judicial Elections.

As the preceding discussion illustrates, jurists can have *both* integrity and opinions. And they can express their opinions on legal issues to the electorate without compromising that integrity. Indeed, where disputed legal issues involve discretion, policy choice, and values, it is entirely proper for jurists to take into account public debate on such issues and, if they are so inclined, to participate in that debate.

The longstanding debate over the role of judges and over jurisprudential models such as strict construction or an evolving-law approach serves as a particularly apt example. The process by which courts interpret potentially ambiguous law or handle cases in the interstices of statutory provisions is one about which reasonable jurists and the public may disagree. And the different approaches taken by jurists can have profound impacts on the outcome of particular cases. But it surely does not reflect any lack of integrity for a jurist, prior to hearing argument in a case, to have an opinion regarding the jurisprudential model he will use. And it poses no threat to judicial integrity for a judge to announce – as did petitioner Wersal in this case – that he favors strict construction over more fluid jurisprudential models. Indeed, judges' discussion of their views on jurisprudence occurs regularly in scholarly and professional publications, typically invoking praise for its educational and professional value. *See, e.g.*, *Judicial Review of Legislation*, 77 Mich. Bar J. 32 (Jan. 1998) (debate between Michigan State Supreme Court Justice Clifford Taylor and Federal District Court (E.D. Mich.) Judge Avern Cohn over the role of judges). The general public – bearing ultimate responsibility for judicial selection – can benefit as much or more than members of the legal profession from the discussion of such views during judicial campaigns.

Insofar as the public is concerned with such differences in jurisprudence, the discussion of the issue and the announcement of a candidate's views thereon only serve to facilitate the democratic process and to give the public genuine choice based on matters of substance and consequence. The notion that it threatens judicial integrity to provide the public the information it needs to make its choice gets it entirely backwards. Integrity in an elective environment is only enhanced

by honest discussion of a candidate's views on matters important to the election.[3]

Judicial integrity ultimately means remaining true and faithful to your role and to the unique elements – including elections and the authority to create common law – that define your role. Where a state has chosen to make jurists accountable through recurring elections, responding to and facilitating such accountability is part and parcel of elective judicial office and can be accomplished with no loss of judicial integrity, properly understood.

III. Preventing Candidates from Announcing Views Relevant to an Election Does Not Advance Any Compelling State Interests.

In considering whether the announce clause serves a compelling state interest, the Eighth Circuit began by simply incorporating its earlier determination that a compelling interest in judicial independence supported the restrictions on partisan campaign activities, which are no longer at issue in this Court. 247 F.3d at 876. The court of appeals held in that earlier discussion that "guarantee[ing] the independence of the Minnesota judiciary * * * is crucial to preserve[ing] the justice of its courts of law and its citizens' faith in those courts," and that there "is simply no question but that a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order." 247 F.3d at 864. The claimed strength of the State's interest in judicial independence was bolstered by reliance on the Minnesota case of *Peterson v. Stafford,* 490

[3] Indeed, recognizing that judicial elections are intended to create a degree of accountability means that jurists not only may wish to explain their views on disputed issues such as jurisprudence, but they also may choose to remain open to adjusting their jurisprudential approach based on public input during the campaign and through the ballot box. Remaining open to such public influence on matters involving discretion – rather than being rigidly "independent" – reflects the integrity and purposes of the election process itself.

N.W.2d 418 (Minn.1992), for the proposition, offered in a quite different context, that the goal of the Minnesota Constitution, like the Federal Constitution, is to

> "create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences"[]

247 F.3d at 865 (quoting *Peterson*, 490 N.W.2d at 420) (footnote omitted).

The asserted threat to that generalized state interest is that a jurist who has made announcements regarding issues that later arise in a case "risks appearing as though he or she prejudged the case rather than gave it due consideration in light of the law, arguments, and facts" if his vote is consistent with his announced views and "risks being assailed as a dissembler" if it is not. 247 F.3d at 878. The "apparent rigidity" in the first instance is claimed potentially to "undermine the faith of the litigants and public in the judge's decision and in the State's judicial system generally," and the fear in the second instance is that "the judge may hesitate to decide the case in a way that might lose votes at the next election." *Id.*

The Eighth Circuit's analysis of the state interest in this case, and the manner in which the announce clause supposedly advances that interest, is problematic in several respects.

The particularized interests behind the announce clause are not compelling. The determination that the interest in judicial independence is compelling was made at too high a level of generality to be meaningful. Any interest can be described at a sufficiently high level to make it seem compelling. For example, maintaining a sound economy and avoiding a depression is certainly compelling in the abstract, but not every economic measure satisfies the compelling-interest standard.[4] This Court should look to the more specific inter-

[4] This Court should distinguish between valid, substantial, and compelling interests. If the various levels of scrutiny have any meaning at all, then

ests in preventing direct communication of a candidate's views to determine whether *those* interests are compelling.

The more specific interests advanced in support of the announce clause are twofold. The first is the supposed impact on public faith in the judicial system if a judge acts consistently with his announced views and thus appears "rigid[]" in his views and unwilling to consider the particulars of a specific case. The second is the alternative possibility that concern for electoral consequences might cause a judge to decide cases consistent with prior announced views even when the judge has since reconsidered those views.

A central problem with these two asserted interests is that they are primarily a function of conduct within the scope of the "pledges or promises" clause of Canon 5, *see supra* at 2, and are implicated only indirectly and tangentially by the distinct category of speech prohibited by the announce clause. The concerns over apparent rigidity or an unwillingness to apply new views different from those previously announced is more evident in connection with statements regarding the *outcome* of future cases. Indeed, the Eighth Circuit seemed to recognize that connection when it argued that during an election campaign "the candidate simply cannot predict what the facts or arguments *in a particular case* may be, the precise way in which legal issues will present themselves, or other crucial factors that need be considered before a court issues a final decision." 247 F.3d at 877 (emphasis added). But the court also acknowledged that "the pledges and promises provision of Canon 5(A)(3)(d)(i) addresses the type of campaign conduct that most blatantly subverts the judicial office – pledges by candidates to make specific decisions on the bench." *Id.*

With actual commitments as to future cases, as well as litigant- or fact-based bias, being addressed by provisions not

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those different levels of interest necessary for rational-basis, intermediate, and strict scrutiny must be given identifiable boundaries.

challenged here, the remaining concern seems to be that the announcement of views on disputed issues will function as "implied commitments" to decide cases in accordance with such views. *Buckley*, 997 F.2d at 227; *see also Kelly*. 247 F.3d at 877 (the announce clause "prevents candidates from *implying* how they would decide cases that might come before them as a judge") (emphasis added). But it is far from clear that the statements covered by the announce clause, rather than by the narrower pledges clause, actually do imply a commitment to a specific outcome in future cases. Instead, the announce clause bars speech on the broader category of *issues*, and while such speech may imply a jurist's anticipated approach to such issues in general, it is quite a stretch to the further implication that the jurist will ignore individualized factors relevant to how the jurist's announced approach would apply in specific future cases. Absent the implication of precommitment to specific outcomes in cases, the announcement of views on legal issues raises only very attenuated concerns that do not rise to the level of *compelling* interests.

The examples given by the court of appeals actually tend to disprove the stated concern over the broad category of announcements as opposed to more specific commitments regarding future cases. For example, the court cited "declarations by candidates that legislation relating to hot-button social issues is or is not constitutional" and "opinions about how unsettled legal issues should be resolved" as raising the threat of prejudgment. 247 F.3d at 877. The first example seems more an instance of a commitment, or at least a prediction, of the outcome of a future case regarding a specific piece of legislation. As such it falls more into the realm of the pledges and promises clause regarding future *decisions* than into the realm of views regarding *issues*.

The second example is more nebulous in that it depends on the particular issue and the nature of the resolution suggested. If the disputed "issue" involves the application of the law to prospective facts or circumstances, then once again

announcing the resolution of such an issue trenches upon the area of commitments regarding future decisions and would fall under the separate clause of Canon 5. If, on the other hand, the issue is the hotly disputed question of what jurisprudential framework to use when judging, the suggestion that announcements will appear to prejudge future cases seems fanciful. Similarly, where the disputed issues involve matters such as the nature or existence of substantive due process, the role of punitive damages, or the weight to be accorded the interests of victims in discretionary multi-factor balancing tests, announcing views on those issues creates no implied prejudgment of a future case; it merely recognizes that judging is conducted within a framework of values and views that pre-exist and may impact future cases, but that do not prejudge the specifics of those cases. *Cf. Tatum*, 409 U.S. at 834 ("Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities."); *id.* at 838-39 ("neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law.").

Because the concerns raised by the mere *implications* of announcements regarding issues, as opposed to pledges regarding cases, are only attenuated manifestations of the State's more generalized interests, the particularized interests that exist in this case are not compelling. Just as a marginal economic program cannot claim the protection of a compelling state interest in averting economic collapse, neither can the marginal effort to reduce the attenuated effects of otherwise wholly proper statements. While states may well have *legitimate* interests in both limited economic stimuli and attenuated perceptions and political pressures impacting the judiciary, it requires far more for a legitimate interest to be transformed into a *compelling* interest.[5]

Inconsistent pursuit of state interests diminishes their weight. The court of appeals further erred in its analysis by misapprehending both the facts and the relevance of Minnesota's inconsistent and contradictory pursuit of judicial independence.

As to the facts, the Eighth Circuit's holding that Minnesota continues to pursue "the ideal of an independent judiciary," 247 F.3d at 865, is belied by the mere existence of judicial elections. As discussed above, the very point of such elections – and their inevitable consequence regardless of intent – is to make jurists accountable to the public. Accountability and independence are the antitheses of each other and Minnesota is plainly pursuing a balance between the two "ideals" of full independence and full accountability.

Were Minnesota in fact pursuing the "ideal of an independent judiciary," there are numerous actions it could have, but has not, taken that would more effectively achieve its goal without restricting speech. For example, the terms of elected judges could be lengthened, thus minimizing the impact of any single case and reducing the frequency of campaigns. Or judicial pensions could be made to vest faster and be more

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[5] The court of appeals' citation, 247 F.3d at 877-78, to then-Justice Rehnquist's memorandum regarding disqualification in *Laird v. Tatum*, 409 U.S. 824 (1972), actually confirms that the interests in this case, while valid, are not compelling. The vast majority of that memorandum flatly rejected the notion that a prior expression of views on a legal issue impaired a jurist in subsequently ruling on such an issue. And while the opinion in a footnote did draw a distinction between statements made before and after nomination to the bench, that distinction was "[i]n terms of propriety, rather than disqualification." *Id.* at 836 n. 5. While reasonable jurists may differ about the "propriety" of particular statements on issues, the fact that the memorandum seems to treat even post-nomination statements as insufficient to force disqualification suggests that concern over such statements does not rise to the level of a compelling interest.

generous, thus reducing any financial concerns related to the possible loss of an election from an unpopular but correct decision. Or judges could be elected only once and serve either for life or for a fixed term of years with no reelection. Or, of course, elections could be eliminated entirely and judges could be appointed with life tenure and protected salaries according to the federal model. Any one of those options would have a greater impact on increasing judicial independence than does the announce clause, yet Minnesota has adopted none of them. That is the State's prerogative, and there are no doubt competing considerations for each of those suggestions, but it nonetheless repudiates the notion that Minnesota is in fact pursuing an independence "ideal" for its judicial system.

Minnesota's pursuit of its asserted interests is inconsistent and incomplete in other ways as well. With regard to the particularized interests of avoiding the appearance of rigidity from following, or the fear of electoral consequences from abandoning, previously announced views, Minnesota – by necessity – leaves unregulated the single biggest threat to both of those interests: Judicial opinions. Published opinions involving disputed legal issues are likely to be much more definitive and detailed regarding a jurist's future inclinations than campaign announcements would be. *See Tatum*, 409 U.S. at 835 ("Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason.") Deviation from such opinions in future cases is far more likely to generate public backlash on grounds of inconsistency and dissembling. The authorship of extensive concurrences, dissents, and *dicta* to express views

on numerous disputed legal issues compounds the effect of such unregulated "announcements" from the bench.

Even the Eighth Circuit itself inadvertently imputes inconsistency to Minnesota's pursuit of its interests, suggesting that the Minnesota Supreme Court would exempt numerous disputed issues from the facially broad language of the announce clause. For example, the court of appeals believed that the announce clause would not be found to cover "general discussions of case law or a candidate's judicial philosophy" or the expression of views on "issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's perception of a judge's role in the judicial system." 247 F.3d at 882. All of those potentially disputed issues are likely to come before a court, and hence fall within even the narrowed construction of the announce clause ratified by the Eighth Circuit.[6] And they implicate the State's proffered interests no less than the conduct that led to this case. Indeed, petitioner Wersal's announcements during his campaign involved two of the very issues that the court of appeals imagines might be exempt – a statement of judicial philosophy and criticism of past cases – yet the court still rejected his challenge. While the hypothesized exceptions thus offer little certainty or security to a judicial candidate, their mere suggestion calls into doubt the coherence of the State's pursuit of the alleged interests in this case.

The relevance of such inconsistency in the pursuit of an interest is that it will reduce the constitutional weight accorded the asserted interest. *See Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 186-87 (1999) (questioning assumption that a government interest in

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[6] The limitation of the announce clause to issues likely to come before the court is essentially meaningless in this case, both because almost any issue is likely to come before a court in one fashion or another and because issues likely to come before the court are the only ones *relevant* to a judicial election campaign and hence most acutely implicate the First Amendment.

reducing gambling is "substantial" where government has determined that "the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations" and some gambling is sanctioned despite "awareness of the potential social costs"; policy was "decidedly equivocal," and Court "cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General"); *Carey* v. *Brown,* 447 U.S. 455, 465 (1980) (classification scheme "suggests that Illinois itself has determined that residential privacy is not a transcendent objective: While broadly permitting all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility.").

The pursuit of the "ideal" of judicial independence is not compelling in a system that specifically sacrifices independence for accountability through elections. Generic statements about independence beg the question of independence from what? Surely not independence from popular opinion; that is the very point, and surely the inevitable consequence, of elections – particularly recurring elections.

The Eighth Circuit's claim that various other courts have found that "the decision to elect judges cannot be regarded as abandonment of a State's interest in an independent judiciary," 247 F.3d at 866-67, largely misses the point. Nobody doubts that, even in an elected judiciary, independence remains *an* interest – particularly in connection with impartial treatment of individual litigants, adherence to controlling law, and other non-discretionary aspects of judging. But with regard to other aspects of judging that involve discretion, policy

judgment, or jurisprudential differences, the interest in accountability inherent in elections waxes and the interest in independence correspondingly wanes. Judicial independence on such discretionary matters still remains an interest – it is not "abandoned" – but it surely ceases to be the "ideal" and cannot be deemed a *compelling* interest. It is simply one among several conflicting interests at stake, and a state's valid interest in marginal adjustments to the balance between accountability and independence is subordinate to the structural role of the First Amendment in the context of democratic elections.

Minnesota case law does not establish a compelling interest relevant to this case. The Eighth Circuit's reliance on Minnesota's *Peterson* case for evidence of a compelling state interest is misplaced. That case involved an equal protection challenge to a rule that placed the designation "incumbent" on the ballot next to the names of judicial candidates seeking reelection. The claimed interest behind that rule was to increase the information available to the voters:

> "In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is. * * * The underlying purpose of the legislation is to identify the candidate so that the voter will know whom he is voting for."

490 N.W.2d at 423-24 (*quoting Gustafson v. Holm,* 44 N.W.2d 443, 477 (Minn. 1950)). The court then applied rational-basis scrutiny and concluded that "the overriding purpose of the ballot designation has been to assure an able, independent and stable judiciary while, at the same time, requiring incumbent judges to submit to voter appraisal in an open election," and that those were "legitimate considerations which satisfy the equal protection clause." 490 N.W.2d at 424. *Peterson's* treatment of the competing interests of independence for the judiciary and voter appraisal of judges as "legitimate" under rational-basis scrutiny is not at all ade-

quate to demonstrate that judicial independence alone is a "compelling" interest under strict scrutiny.

The background discussion in *Peterson* regarding the nature of the Minnesota judiciary deals not with any interest in the judiciary being independent from public opinion regarding disputed issues, but rather with a judge's independence from direct partisan relationships with political parties. *See id.* at 422 (noting the "inherent tension in the judicial election process" and the legislature's effort to counter conflicts "between the demands of an election process and the judicial impartiality required to decide cases free from political maneuvering" by requiring that judicial elections be nonpartisan). But the court repeatedly recognized that responsiveness to the voters is a competing interest that weighs against notions of perfect independence. *Id.* at 422-23. The court ultimately characterized Minnesota's choice as a "middle-of-the-road approach to judicial selection." *Id.* at 425.

Regardless of whether *Peterson* might be read to support a compelling interest in judicial independence from political parties and partisan politics, the issue of speaking to and seeking endorsements from political parties is no longer part of this case and may present somewhat different considerations in the context of Minnesota's nonpartisan judicial election process. But the "middle-of-the-road" treatment of the competing interests of judicial independence and accountability to the public suggests that the ideal of a judiciary independent from all (nonpartisan) political influence simply does not exist and is not sought in Minnesota.[7] Judicial independence is merely one interest among several competing interests. And while it is certainly a legitimate interest, it is not a compelling

[7] Even assuming that *Peterson* should be read more broadly to state an interest in independence from the electorate as well as from political parties, merely having the State or its courts pronounce such an interest does not make it so and does not answer the federal constitutional question of whether such an interest is compelling.

interest sufficient to overcome the supervening weight of the First Amendment in the context of core political speech.

The claimed interest in independence does not account for judicial law-making and discretionary functions. The conception of judges underlying the asserted interests in this case also ignores the role of state courts in *making* the law, not merely applying settled law to facts determined at trial. For example, the court of appeals repeatedly refers to the "judges' obligation to render impartial decisions based on the law and facts." 247 F.3d at 877. Similarly, the Third Circuit in *Stretton* v. *Disciplinary Bd.*, 944 F.2d 137, 142 (CA3 1991), offers a narrow conception of the judicial system as "based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government." But it is incorrect to view the judicial function in state courts as merely interpretive. State-court authority over the common law fully repudiates such a federal-centric notion of the judicial function. And even as to interpretation, jurisprudential policy and values play a significant role in the decision-making process and are not dictated by external law.[8]

A judicial candidate's announcement of his views on such discretionary issues is fully compatible with the judicial role and is often essential to understanding how a candidate will implement that role. Jurisprudential views, discussed *supra* at 11, are the easiest example. Similarly, a greater or lesser regard for victim and societal interests in criminal sentencing, or a concern with inequality in sentencing for different drug offenses, are perfectly valid points of discussion for jurists

[8] Interestingly, the notion that courts merely interpret law created by others does little do distinguish the executive branch, which has the primary function of executing the laws enacted by the legislature. While it is true that executive officials have substantial discretion in numerous areas that can be influenced by policies and politics, such discretion likewise does not distinguish executive officials from judges when the latter are exercising their authority to create common law.

who will be called upon to exercise discretion when sentencing within broad ranges based on a multitude of legislatively prescribed factors. Class action and punitive damages rules are further examples of topics that can raise both legal and political controversy and that are subject to significant judicial "legislation" in many circumstances. Finally, state supreme courts also act in a distinctly legislative capacity with regard to ethical canons and procedural rules that, as this case itself demonstrates, can become the focus of legal and political debate.

Tangential effect on public confidence is not a compelling interest. In addition to finding a compelling interest in the independence and impartiality of jurists, the Eighth Circuit posited a further "equally important interest in preserving public confidence in that independence and impartiality." 247 F.3d at 867 (citations omitted). The concern over public confidence, however, assumes that Minnesota citizens share the same misperception as the Eighth Circuit regarding the nature of the Minnesota judiciary. That assumption seems unlikely given that Minnesotans have rejected efforts to abolish the judicial election process and hence seem to have ample confidence in an accountable judiciary. There is simply no reason to think that the citizenry fails to understand the competing interests in accountability and independence or cannot be educated, through more speech rather than suppression, to understand those divergent elements in their judiciary.

Furthermore, insofar as the interest in public confidence turns on maintaining the mere "appearance" of platonic independence from all influence and the absence of opinions on disputed issues, such an interest is especially suspect. If the point of the announce clause is simply to hide from public sight the views of candidates on disputed issues, then it is at best pointless and at worst *per se* invalid. If we start with the premise that judicial candidates in fact have views on the various issues covered by the announce clause, then Canon 5 does nothing more than attempt to deprive the public of accu-

rate information about those candidates. But it is singularly ineffective if the goal is to persuade the public that judges are in fact *tabula rasa* – the public is not so naive and third-party speakers during election campaigns will surely impute various views to the candidates. One would expect the public to have *less* confidence, not more, as a result of such a blatant attempt at hiding the ball, and, indeed, there are frequent accusations that judges are "hiding behind the robe" when they refuse to answer questions during a campaign. A more likely expectation – consistent with First Amendment principles – is that the public would gain more confidence in the system if the candidates themselves gave accurate descriptions of their views and were allowed to explain the valid role of such views in the judicial process. And insofar as Canon 5 were successful in leading the public to believe that jurists lacked any views on relevant disputed issues, then an interest in such misdirection should be *per se* invalid under the First Amendment. Suppressing information in order to deceive the public cannot be a compelling interest in and of itself, and in the context of deception intended to influence election campaigns such suppression strikes at the very heart of democracy.

IV. Restricting Candidate Speech in Judicial Elections Severely Burdens First Amendment Rights and Distorts the Election Process.

Aside from being justified through alleged interests in tension with the public accountability established through use of the election process, the announce clause also has a number of consequences at odds with core First Amendment principles and with the democratic process.

First, barring candidates themselves from announcing their views on matters relevant to their job performance deprives the public of the most accurate source of such information. The rule effectively empties the marketplace of those speakers with the most pertinent information and instead leaves it to third parties to characterize – and mischaracterize

– a jurist's views on significant issues. Even in the face of third-party distortion, candidates are restricted from correcting any error by offering an accurate statement of their views.

Second, the rule creates incentives for peculiar evasions that only further distort the campaign process and the judicial function in general. In the case of challengers, there would be great incentive to announce or publish one's views just prior to announcing a judicial candidacy, and then to let those previous statements do the work. In the case of incumbents, there is a perverse incentive to write separate opinions and *dicta* made for public consumption in an eventual election.

Third, to the extent there may be no other sources of information regarding a candidate's views on particular matters, the rule completely deprives the electorate of information relevant to their vote. A candidate's jurisprudential model can be a central and hotly disputed point in a judicial election, yet voters may be deprived of such information or forced to speculate when exercising their franchise. Likewise, it is difficult to imagine deciding how to vote in states where tort-reform is a major issue without knowing a judicial candidate's views on the role of punitive damages, on the relative importance of compensation versus deterrence in tort law, and on the scope of legislative authority to intrude upon the common law. Even criticism of past cases – as attempted by petitioner Wersal – is forbidden by the announce clause, yet such discussion might well provide the most direct and meaningful comparison between two candidates.[9]

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[9] Consider a challenger discussing a past decision authored by the incumbent and stating that he agreed with the dissent or even would have taken yet a third path in resolving the case. Such discussion is of self-evident value, deals with matters wholly in the past, and concerns an issue on which the incumbent has already "announced" his views in a written opinion. To deprive the public of any discussion of such opinions seems absurd – how else would one evaluate a jurist's performance in office but through examination of his or her opinions.

While information regarding a candidate's general experience, education, and professional qualifications would remain available to the public, it can hardly be doubted that a candidate's views will often be of critical importance in an election. For example, if voters were asked to choose between Justice Felix Frankfurter and Justice Hugo Black in a judicial election, it would be impossible for them to make an informed decision without access to the very different views of those candidates on the Fourteenth Amendment incorporation doctrine and the role of the courts implicit in their divergent approaches. *Compare Adamson* v. *California*, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring) ("'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth") *with id.* at 71-72, 75 (Black, J., dissenting) ("one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states"; "the 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.").

Similarly, in an example particularly appropriate to the historical origins of Minnesota's elective judicial system, voters asked to choose between Chief Justice Roger Taney and Justice Samuel Miller would be thwarted in the exercise of their rights to influence the direction of the state judiciary if they were deprived of the views of those jurists regarding due process. *Compare Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 292, 450 (1856) ("[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particu-

lar Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."), *with Davidson* v. *City of New Orleans*, 96 U.S. (6 Otto) 97, 104-05 (1877) (when property is taken for public use, and provides judicial review of the lawfulness of the action, the "judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections").

Fourth, inhibiting the candidates' and the public's ability to focus on substantive and jurisprudential issues can only increase the relative importance of non-substantive factors such as name and physical appearance – read ethnicity, race, and gender. The First Amendment assumes that through full and free discussion of ideas the democratic process will be strengthened and voter decision making will be improved. Suppressing such discussion merely opens the field for assumptions and prejudice to gain a more prominent role in decision making.

V. ANNOUNCING JUDICIAL VIEWS SHOULD BE PROTECTED SO LONG AS A CANDIDATE DOES NOT MAKE A PROMISE OR COMMITMENT THAT WOULD VIOLATE JUDICIAL OBLIGATIONS IF ACTED UPON.

Taking into account the competing concerns of judicial accountability and independence, and the First Amendment constraints on restricting political speech, the proper rule for announcing views in judicial campaigns should focus on whether the views discussed concern matters over which the jurist will eventually have discretion to act according to those views. Such a focus on discretion, or the lack thereof, means that express promises or commitments of a specific result in future cases can be seen as beyond a jurist's discretion because they essentially violate the judicial obligation to consider each case and listen to the arguments of the parties. Precommitment says that the jurist will not consider the arguments of the parties because his or her mind is already closed to any alternative outcome. Such promises of improper behavior can be prohibited.

That limitation on speech can be reflected in a constitutional rule distinguishing between the announcement of views on how particular law should be applied to hypothesized or undeveloped facts in some future case and announcements of views regarding only the principles of the law or elements of discretion that would frame the consideration of such future cases. The distinction between discussing outcomes in future cases and issues that might simply affect the outcome of cases draws its strength from the unique aspects of an elected judiciary and addresses both the need for independent and impartial justice for individual litigants and the right of the public to exert control over the direction of the courts and the make-up of the judiciary.

Similarly, promises to ignore the law (statutory or constitutional) likewise violate the judicial duty to apply the law, and hence are not within the prospective discretion of a judicial candidate. Such candidates thus can be prohibited from campaigning on a platform that, for example, promises never to let certain categories of persons out on bail notwithstanding laws that establish criteria for allowing bail.

But aside from promises not to follow various non-discretionary judicial duties, judicial candidates should be free to announce their views on any matter relevant to issues where judicial discretion validly comes into play. Thus, a candidate should be free to opine on the weight, or lack thereof, given to victims' interests in sentencing where such sentencing involves a multi-factor balancing test that leaves the weight of the different factors to the discretion of the judge. Likewise, candidates should be free to discuss their policy views regarding business climate, consumer injuries, or any of the myriad of factors bearing upon areas such as tort law, punitive damages, class actions, and other topics where the court acts to create, rather than merely interpret, the law.

And, of course, candidates should be free to discuss their jurisprudence and the approach they will take to the role of jurist when interpreting laws created by others as well as in potentially creating common-law rules of their own.

Finally, candidates should be free to discuss past cases that are no longer pending. Such decisions are the ultimate work-product of the judicial office, and all candidates should be free to discuss that work product in the course of seeking judicial office. Because such cases are fixed in both their facts and their results, and because at least some jurists have, by definition, already publicly opined on the issues contained in decided cases, they provide a particularly valuable point of comparison for citizens seeking to understand potential differences between the candidates for whom they are being asked to vote.

Under the standards just described, this Court should find that Canon 5's announce clause violates the First Amendment. The conduct of petitioner Wersal that placed him in jeopardy and triggered his challenge to the announce clause was his discussion of his judicial philosophy of strict construction and his criticism of certain past decisions of the Minnesota Supreme Court. Such speech is fully protected and does not pose a threat to any compelling state interest.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Eighth Circuit should be reversed.

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No. 01-521

IN THE

Supreme Court of the United States

October Term, 2001

REPUBLICAN PARTY OF MINNESOTA, ET AL.,

Petitioners,

v.

KELLY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE MINNESOTA CIVIL LIBERTIES UNION SUPPORTING PETITIONERS

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INTEREST OF THE AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles embodied in the Bill of Rights. The Minnesota Civil Liberties Union is one of its statewide affiliates. Since its founding in 1920, the ACLU has been deeply involved in securing the free speech rights embodied in the First Amendment. In support of that central organizational goal, the ACLU has appeared before this Court in numerous free speech cases both as direct counsel and as *amicus curiae*.

The ACLU takes no position on the propriety of an elected as opposed to an appointed judiciary. However, it strongly believes that if a state does provide for popular election of judges, campaign speech by candidates for judicial office, like campaign speech by candidates for other offices, is entitled to the highest degree of First Amendment protection.

SUMMARY OF ARGUMENT

Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct specifies, in the provision under review, that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues."[2] Construing this

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[1] Petitioners have informed counsel for *amici* that the parties have filed blanket letters of consent with the Clerk pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Canon 5(A)(3)(d)(i) reads in full:

> A candidate for judicial office, including an incumbent judge shall not: (i) make pledges or promises of conduct in office

"announce" clause to prohibit candidates only "from publicly making known how they would decide issues likely to come before them as judges" (P. App. 53a), the Eighth Circuit upheld the prohibition against First Amendment challenge as serving Minnesota's interests in guaranteeing the "independence" of its judiciary and preserving public confidence in the judiciary. (P. App. 26a, 44a, 52a). The "announce" clause, as written and as construed by the Eighth Circuit, cannot survive the strict scrutiny required by the First Amendment.

The "announce" clause, as written, plainly violates the First Amendment. As the Eighth Circuit recognized, the government may not prohibit candidates for elective judicial office from generally expressing views on "disputed legal or political issues." Such speech is core political speech, commanding the highest degree of First Amendment protection. A judicial candidate's expression of views on such issues does not inherently threaten "judicial independence" or any other interest that the government may validly seek to protect. The only conceivable rationale for prohibiting such speech is that voters should not be encouraged to select judges on the basis of their legal or political views. The First Amendment, however, does not permit the government to dictate what voters may consider in

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other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent.

52 Minn. Stat., Code of Jud. Conduct, Canon 5(A)(3)(d)(i). Violations of this Canon are subject to disciplinary action by the Minnesota Office of Lawyers Professional Responsibility ("OLPR") under the direction of the Minnesota Lawyers Professional Responsibility Board ("LPRB"). (P. App. 10a).

electing candidates for public office. Moreover, in states where judges are elected, such a general prohibition would undermine the democratic function by disabling the electorate from influencing the direction of the courts, by preventing candidates from responding to attacks, and by shielding incumbents from criticism by challengers.

Neither is the prohibition saved by construing it, as the court below did, to prohibit judicial candidates only from "making known how they would decide issues likely to come before them as judges." Such a construction does not cure the overbreadth of the general prohibition because, as Judge Posner has observed, there is almost no legal or political "issue" that is *unlikely* to come before a judge of a court of general jurisdiction in this country. Moreover, a prohibition against a candidate "making known" how he or she would decide such an issue is unconstitutionally vague, inviting the application of subjective judgment by those charged with enforcement in deciding whether the candidate has indeed expressed a view. The First Amendment requires that the boundary between permitted and prohibited speech be more clearly marked.

Properly understood, the government interest at stake in this case is the compelling interest in avoiding compromise of the judicial function of deciding each case on the basis of a fair and impartial hearing, after giving due consideration to the arguments and evidence presented by the parties. *Amici* agree that this function is central to the rule of law. Candidates for judicial office, once elected, cannot perform that function if they have already committed themselves, in advance, to reach a particular result in a particular case likely to come before them as judges. Thus, the First Amendment permits the government to protect the judicial function by regulating speech by judicial candidates that makes such advance commitments—as long as the regulation sweeps no further and delineates with sufficient clarity what speech is prohibited. To avoid unconstitutional vagueness, any such

regulation must be limited to speech by judicial candidates that expressly commits them to a particular result in a particular case likely to come before them.

ARGUMENT

I. THE "ANNOUNCE" CLAUSE VIOLATES THE FIRST AMENDMENT.

A. The Government May Not Prohibit Candidates for Elective Judicial Office from Generally Expressing their Views on "Disputed Legal and Political Issues."

Political expression "occupies the core of the protection afforded by the First Amendment," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), and the First Amendment interest in protecting political speech is at its very peak during election campaigns. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971). Not only is "'debate on the qualifications of candidates integral to the operation of the system of government established by our Constitution,'" *Eu v. San Francisco Cty. Democratic Cen. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)); equally important, an election campaign is "'a means of disseminating ideas,'" *id.* (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979)), including views on "'structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.'" *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)).

The Court thus has held that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley*, 424 U.S. at 50; *see generally, e.g., Eu*, 489 U.S. at

214 (invalidating law barring political parties from making pre-primary endorsements); *Brown*, 456 U.S. at 45 (invalidating statute that authorized voiding an election if a candidate made a false campaign statement); *Buckley*, 424 U.S. at 13-16 (invalidating restrictions on the amount of money a candidate may spend campaigning for office); *Mills*, 384 U.S. at 214 (invalidating law banning election day endorsements of candidates by newspapers).

As the Court has recognized, the First Amendment protects the candidate as well as the voter. "The political candidate does not lose the protection of the First Amendment when he declares himself for public office." *Brown*, 456 U.S. at 53. To the contrary:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election. . . . Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion), applies with special force to candidates for public office.

Id. at 52-53.

These principles apply no less to speech by and about candidates for elective judicial office than to speech by and about candidates for other elective office. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will

inevitably shape the course that we follow. . . ." *Buckley*, 424 U.S. at 14-15. The fact that candidates seek election as judges does not free the government to "hamstring[ ] voters seeking to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223. There is no "judicial candidate" exception to the First Amendment.

Even if it were possible to isolate from the universe of all "disputed legal or political issues" those "likely to come before the courts," speech on such issues by judicial candidates—as well as by their supporters and opponents—lies at the heart of the First Amendment. "The operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 839 (1978). In a state where judges are elected, a judicial election campaign is not only the most obvious occasion for public debate on such matters; it is also the *only* occasion on which such matters are susceptible to influence by the electorate. A candidate for governor of a state that provides for an appointed judiciary may place such matters in issue in an election campaign by praising or criticizing the state's courts for the direction of their decisions, and by pledging to appoint—or not to appoint—judges who, for example, would be "tough on crime," protect the civil rights of homosexuals, or preserve a woman's "right to choose." In a state where judges are elected, however, these are matters that can be presented to the electorate only in the context of a judicial election campaign. Thus, candidates seeking election or reelection to judicial office must be allowed to address such matters and the voters to consider them. *Cf. Craig v. Harney*, 331 U.S. 367, 377 (1947) ("Judges who stand for reelection run on their records. . . . Discussion of their conduct is appropriate, if not necessary."). Moreover, if a judicial candidate is *attacked* for supposedly holding a particular view on a controversial legal or political issue, the candidate must be free to respond. The speech restriction at issue in this case

would not permit the candidate to do so. Incumbents, in turn, are insulated from attack by challengers.[3]

Nothing in the nature of the judicial function licenses the government to limit what a judicial candidate may reveal about himself—and what the electorate may learn about him—to those matters that the government deems "relevant" or "important" to a candidate's selection as a judge. Under the First Amendment, "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

> In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley, 424 U.S. at 57.

Accordingly, "[i]t is simply not the function of government to 'select which issues are worth discussing or debating' in the course of a political campaign." *Brown*, 456 U.S. at 60 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). As the Court stated in *Brown*:

> [The First Amendment] embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between

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[3] Indeed, the Minnesota Code of Judicial Conduct specifies that a candidate's response to statements made during a campaign for judicial office must comply with the limitations of Canon 5(A)(3)(d). *See* 52 Minn. Stat., Code of Jud. Conduct, Canon 5(A)(3)(e).

> candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.

Id.; see Tashjian v. Republican Party of Conn., 479 U.S. 208, 221 (1986) ("'A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983); *Eu*, 489 U.S. at 223 ("A 'highly paternalistic approach' limiting what people may hear is generally suspect, but it is particularly egregious where the State censors . . . political speech. . . .") (citations omitted); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1977) (stating that First Amendment prohibits government from "limiting the stock of information from which members of the public may draw"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) (characterizing as "dubious" any justification for restricting speech that is "based on the benefits of public ignorance").[4]

The notion that the government may seek to prevent voters from selecting judges on the basis of their views on disputed legal or political issues, because the government believes that such factors should not be "relevant," closely resembles the notion—rejected by this Court—that speech may be restricted "in the name of preserving the dignity of the bench." *Landmark Communications*, 435 U.S. at 840.

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[4] That the "announce" clause is viewpoint-neutral is immaterial: "This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition on public discussion of an entire topic." *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

The Court has recognized that "speech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or judges as individuals or as anointed priests set apart from the community." *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 291-92 (1941) (Frankfurter, J., dissenting)).

Even if the First Amendment permitted the government to decide that voters should not select judges on the basis of their views on public issues or other matters, the government could not prevent candidates from holding those views or from acting on them once elected. Thus, a rule preventing the candidate from disclosing those views would simply result in a "blind" choice by the voters, disabled from distinguishing among candidates on the basis of factors that may well affect the actions of the candidates once elected. The result would not be a judiciary composed of judges who bring to the bench no views on the issues that may come before them. *See generally Laird v. Tatum*, 409 U.S. 824, 831-36 (1972) (Rehnquist, J.) (on motion for recusal) (discussing pre-nomination expressions of views on issues likely to come before the Court by Justices Black, Frankfurter, Jackson, and Holmes, and by Chief Justices Vinson and Hughes). The result would be an electorate effectively disenfranchised by having to choose in the dark, disabled from "predicting the effect of their vote." *Brown*, 456 U.S. at 55-56.

B. Limiting the Prohibition to Expression "Making Known" a Candidate's Views on "Issues Likely To Come before the Court" Does Not Save It.

"When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment . . . requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily

circumscribing protected expression." *Brown*, 456 U.S. at 53-54. The "announce" clause, even as construed by the Eighth Circuit to prohibit judicial candidates only from "making known how they would decide issues likely to come before them as judges" does not satisfy these requirements.[5]

1. The government interest at issue here is the compelling interest in avoiding prejudgment of cases.

A state has a compelling interest in fair and impartial decisionmaking by its judges—decisions based on the evidence and arguments adduced by the parties to the case and subjected to the rigors of the adversary process. It would subvert this judicial function for a judicial candidate to commit himself in advance to a particular result in a particular case, without benefit of such evidence or argument. Thus, a state plainly has a compelling interest in regulating candidate speech that expressly commits the candidate, in advance, to particular results in particular cases. A state may regulate such speech "without trenching on any right . . . protected by the First Amendment." *Brown*, 456 U.S. at 55.[6]

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[5] The current ABA Model Canon suffers from the same defects of vagueness and overbreadth as the "announce" clause as construed by the Eighth Circuit. The ABA Model Canon prohibits judicial candidates from making statements "that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Jud. Conduct, Canon 5(A)(3)(d)(ii).

[6] Although incompatible with the judicial function, precommitment is not incompatible with the legislative function. Under our system, candidates for legislative office are meant to be elected on the basis of what voters expect them to do once in office if elected. Our system presupposes that candidates for legislative office will be free to tell voters quite specifically how they would exercise public power, whether by "a promise to lower taxes, to increase efficiency in government, or indeed to increase taxes. . . ."

2. Construing the "announce" clause to apply only to "issues likely to come before the court" is not a meaningful limitation.

It is elementary that, to survive First Amendment scrutiny, a restriction on political speech must be drafted so that only speech that threatens the cognizable government interest is prohibited. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Brown*, 456 U.S. at 54 (restriction must operate without "unnecessarily circumscribing protected expression"). The "announce" clause as written and as construed is fatally overbroad, banning speech by judicial candidates that threatens no legitimate government interest, much less a compelling one. The rule, as Judge Beam observed, "effectively bans campaigning itself." (P. App. 76a) (dissenting opinion).

Judge Posner accurately described the effect of the "announce clause" as written:

> The "announce" clause is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not "announce his views on disputed legal or political issues," period. The rule certainly deals effectively with the abuse that the draftsmen were concerned with; but in so doing it gags the judicial candidate. He can say nothing in public about his judicial philosophy; he cannot, for example,

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Brown, 456 U.S. at 58. The judiciary, by contrast, "has a different job to do." (P. App. 18a). Thus, a rule regulating express precommitment, while constitutionally permissible as applied to judicial candidates, is not—as the Court held in *Brown*—constitutionally permissible as applied to candidates for legislative office.

> pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade*. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of prisons, or products liability—or for that matter about laissez faire economics, race relations, the civil war in Yugoslavia, or the proper direction of heath-care reform.

Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993) (Posner, J.). The rule on its face thus bars far more speech than could reasonably be construed as committing a candidate to a result that would compromise his impartiality as a judge.[7]

The narrowing construction adopted by the Eighth Circuit does not solve this problem. As Judge Posner noted:

> There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction. The civil war in Yugoslavia? But we have cases in which Yugoslavs resist deportation to that nation on the ground that they face persecution from one side or another in that nation's multisided civil war; and some years ago the Illinois courts were embroiled in a custody fight involving a child

[7] The "pledges or promises" clause of Canon 5(A)(3)(d)(i), *see* note 2, *supra*, although it comes closer to focusing on the problem that could legitimately be regulated in judicial elections, suffers from the same vagueness and overbreadth problems inherent in the "announce" clause. For example, the clause could be read to prohibit a candidate from "pledging" or "promising" to be "tough on criminals" or observant of "victims' rights." *See Illinois Judicial Review Bd.*, 997 F.2d at 228-29 (Posner, J.).

> who didn't want to return to the then Soviet Union with his Soviet parents.

See id. at 229. Even as construed by the Eighth Circuit, the "announce" clause could be deemed to limit discussion of a candidate's philosophy of judicial interpretation—a perennially disputed "legal" issue. A candidate could not safely pledge himself to "textualism" or to the "rule of lenity," even though these pledges would not undermine his ability to render impartial decisions by committing himself in advance to specific outcomes in particular cases. A candidate similarly could not safely make his views known on such issues as abortion or assisted suicide, or almost any other controversial issue that might be identified, since all might come before the court in one way or another. *See* PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86-87 (1990) (compiling list of various ethics advisory bodies that have suggested that abortion, gun control, the equal rights amendment, drug laws, gambling laws, liquor licensing, pre-trial release, capital punishment, and labor law may not be discussed). In short, limiting the "announce" clause to speech regarding issues "likely to come before the court" offers only an illusion of narrowing and does not avoid vagueness and overbreadth. It is no limitation at all.[8]

[8] The Eighth Circuit predicted that the Minnesota Supreme Court would conclude, if faced with the question, that "general" discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause. (P. App. 54a). The Eighth Circuit also pointed out that the OLPR has issued advisory opinions stating that Canon 5 does not prohibit candidates from discussing appellate court decisions, judicial philosophy, issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's view on a judge's role generally in the judicial system. (P. App. 54a) (citing Minn. Bd. on Jud. Standards, Informal Op. 10/10/1990). Because of these

3. Prohibiting judicial candidates from "making known" their views is unconstitutionally vague.

Vague laws are unconstitutional because they may not only "trap the innocent by not providing fair warning," and foster "arbitrary and discriminatory enforcement," but also because they inhibit protected speech by causing" citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (quotations omitted); *see Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

A candidate plainly "makes known" his or her position on an issue by means of an explicit statement regarding the issue, such as "I oppose abortion." However, it is certainly also possible to treat as an expression of a candidate's views more subtle or indirect communications. For example, a candidate's resume may contain many clues about his or her views on disputed political or legal issues of the day, as might circulation by the candidate of articles by others characterizing the candidate's views. If a candidate reported, for example, that he or she is a "devout member of the Catholic Church," it is possible that the reporting of that fact would be deemed an expression of the candidate's stance on abortion, contraception, assisted suicide, stem cell research, homosexuality, or the appropriateness of the death penalty. *See* McFADDEN, *supra*, at 81-82. Similarly, stating affiliations with the NAACP, the Federalist Society, NOW, or the NRA may similarly be construed to express a view on the issues associated with those groups. Indeed, members of the OLPR who disapprove of particular affiliations might for that very reason construe disclosure of those affiliations as a forbidden expression of views. *Cf. Gentile*, 501 U.S. at 1051 ("[H]istory shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law.").

As a result of the vagueness inherent in the challenged rule even as construed, candidates are left to "guess at its

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glosses, the Eighth Circuit concluded that candidates in Minnesota are left to discuss much more than mere "name, rank, and serial number." (P. App. 56a) (quoting *Illinois Judicial Inquiry Bd.*, 997 F.2d at 227). These predictions, however, are not only suppositional but reflect the ad hoc judgments that the rule entails and extent to which the decision below rests on subjective future judgments by speech regulators. A judicial candidate simply cannot predict what will be considered a "disputed legal or political" issue. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991) (finding vagueness because terms had no "settled usage or tradition of interpretation").

The varied interpretations and limits given to similar clauses by several lower courts demonstrate its lack of precision. *Compare, e.g., Stretton v. Disciplinary Bd. of Supreme Ct. of Pa.*, 944 F.2d 137 (3d Cir. 1991) (limiting clause to views on disputed legal or political issues likely to come before court), *and Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984), *aff'd mem.*, 861 F.2d 719 (6th Cir. 1998) (holding that views regarding domestic relations reforms and to take an active role in court administration were "related to the faithful performance of the duties of judicial office"), *and Ackerson v. Kentucky Judicial Retirement & Removal Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991) (holding Canon overbroad to extent it prohibited campaign commitments regarding administrative matters, but upholding prohibition regarding issues likely to come before court), *with Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993) (finding Illinois' version of rule unconstitutionally vague and overbroad), *and Beshear v. Butt*, 773 F. Supp. 1229 (E.D. Ark. 1991) (same), *rev'd on other grounds*, 966 F.2d 1458 (8th Cir. 1992), *and ACLU v. Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990) (same).

contours," *id.* at 1048, and each potential "statement" must necessarily be considered a risk. The rule as construed "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim" and "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Thomas v. Collins,* 323 U.S. 516, 535 (1945). Judicial candidates are thereby put to the choice of risking punishment by speaking or avoiding such risk by keeping silent or submitting their campaign material and proposed statements to state authorities for preapproval. Those are the very choices to which this Court has held the government may not put would-be speakers. *See, e.g., Buckley*, 424 U.S. at 41 n.47 (powers delegated to advisory board do not assure that "vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups in this or future election years").

C. The Government May Serve Its Compelling Interest in Avoiding Prejudgment by Regulating Speech by Judicial Candidates that Expressly Commits Them in Advance to a Particular Result in a Particular Case Likely To Come before the Court.

The First Amendment permits a state to protect the judiciary by regulation speech by judicial candidates that expressly commit them in advance to a particular result in a particular case likely to come before the court. Such a rule would avoid the problems of overbreadth and vagueness that render the "announce" clause invalid. Any such limitation, however, must apply only to speech that expressly commits a candidate to a specific result; barring speech that could be construed by some listener or disciplinary board as an "implied" commitment, or that would "appear" to commit a candidate, would result in the same flaws that taint the "announce clause," leaving the speaker unable to distinguish

"permitted" speech from "prohibited" speech and inviting arbitrary application of the restriction, ultimately chilling core political speech.

This Court has previously recognized the problems with this approach. In *Buckley v. Valeo*, this Court upheld against a vagueness challenge a provision of the Federal Election Campaign Act of 1971 that banned certain expenditures "relative to" a clearly identified candidate by construing the provision to bar only communications that "in express terms advocate the election or defeat of a clearly identified candidate." *Buckley,* 424 U.S. at 45. It was not enough, the Court reasoned, to limit the provision to statements "advocating" the election or defeat of a candidate, because the line between "advocacy" and other categories of expression is too indefinite and "'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id.* at 43 (quoting *Thomas,* 323 U.S. at 535). Instead, the Court held, the provision must be limited to "communications that include explicit words of advocacy of election or defeat," *id.*—words such as "'vote for,' 'elect,' 'support,' 'defeat,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'," *id.* at 44 n.52. By so construing the provision, the Court ensured that it would regulate with the "'narrow specificity'" required by the First Amendment. *Id.* at 41 n.48 (quoting *Button,* 371 U.S. at 433).

Consistent with *Buckley*, a state may regulate the speech of a judicial candidate that promises, in express terms, to invalidate or uphold a particular state statute, affirm or reverse a particular ruling, impose a particular sentence on a particular defendant, or find particular facts. But a state may not prohibit the candidate from stating, for example, that a particular state law, common law doctrine, or judicial ruling

presents troublesome issues, that courts should not "coddle criminals," countenance "police misconduct," "invent new rights," or "disregard the will of the people." A rule limited to such explicit promises not only avoids vagueness problems but is narrowly drawn to provide maximum scope for protected core political expression. Such a narrowly drawn rule, limited to statements expressly prejudging the result in particular cases likely to come before the candidate as a judge, would allow the government to serve its compelling interest in protecting the judicial function, while still affording maximum protection for the "'unfettered interchange of ideas for the bringing about of political and social change desired by the people.'" *Buckley,* 424 U.S. at 14 (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)).

Moreover, preserving the First Amendment rights of candidates and voters in judicial elections in this fashion would not deprive a state of other less restrictive means of protecting the integrity of the judicial function. Notably, once elected, a judge may be required to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. *See, e.g.,* 52 Minn. Stat., Code of Jud. Conduct, Canon 3(D)(1) (stating such a requirement). Such rules of conduct for sitting judges offer another layer of protection for the state's compelling interest in an impartial judiciary, without trenching on First Amendment rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

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REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

VERNA KELLY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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*. This brief is filed with the consent of the parties. Letters indicating such consent have been filed separately by the parties with the Office of the Clerk of the Supreme Court.

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STATEMENT OF INTEREST OF AMICI**

The American Center for Law and Justice (ACLJ) is a nonprofit public interest law firm and education organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have briefed and argued, or presented the views of amici curiae, in numerous cases before this Court on these issues.[1]

**. No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

1. Counsel for amicus curiae have participated in the presentation of numerous cases in this Court, including: *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (42 U.S.C. § 1985(3)); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Free Speech Clause); *Lee v. ISKCON*, 505 U.S. 672 (1992) (Free Speech Clause); *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994) (18 U.S.C. §§ 1961-68); *United States v. Kokinda*, 497 U.S. 720 (1990) (Free Speech Clause and 39 C.F.R. § 232.1(h)(1)); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (Free Speech Clause); *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290 (2000) (Establishment Clause); *Hill v. Colorado*, 530 U.S. 703 (2000) (Free Speech Clause).

In addition, counsel for amicus curiae have represented groups and individuals as amici curiae in numerous cases before this Court, including: *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (Establishment Clause); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (First Amendment Freedom of Association); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Free Speech and Establishment Clauses); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (Fourteenth Amendment); *Denver Area*

Nothing in the challenged provision of the Minnesota Code of Judicial Conduct bars the residents of Minnesota from *asking* judicial candidates in Minnesota about their views on important matters of public policy and law. Nor is there anything obviously underhanded or unseemly about making such inquiries. Rather, the examination of candidates for any elective office is the hallmark of an informed exercise of the elective franchise. But no declared candidate for judicial office in Minnesota is free to answer such inquiries. Even willing candidates are barred from stating their views when asked for them.

If the purpose of Minnesota Code of Judicial Conduct is to insure that voters engage in *uninformed, ignorant* democracy, then it is well-crafted to that purpose. If the intention of the Code is to insure judicial independence by successful judicial candidates, other provisions of the Code serve that purpose more directly and efficiently. In any event, the challenged Code provision cannot fairly be described as advancing *any* democratic values. For these reasons, the outcome of this dispute, and particularly the principles on which it will be

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Educ. Telcoms. Consortium v. FCC, 518 U.S. 727 (1996) (Cable Television Consumer Protection and Competition Act of 1992); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (Free Speech Clause); *Lee v. Weisman*, 505 U.S. 577 (1992); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Fourteenth Amendment); *Reno v. ACLU*, 520 U.S. 1113 (1997) (Communications Decency Act); *Romer v. Evans*, 517 U.S. 620 (1996) (Equal Protection Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (Free Speech and Establishment Clauses); *Rust v. Sullivan*, 500 U.S. 173 (1991) (42 U.S.C. §§ 300-300a-6 and 42 C.F.R. §§ 59.8-59.10); *Troxel v. Granville*, 530 U.S. 57 (2000) (Fourteenth Amendment); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (Fourteenth Amendment).

decided, are of grave concern to the American Center for Law and Justice.

SUMMARY OF ARGUMENT

Thomas Jefferson, responding to a letter from Wilson Nicholas on the power of the United States to expand its territory by the admission of new States, expressed his doubt regarding a construction of the Constitution given by Mr. Nicholas.[2] While acknowledging the occasional need for the practice of construing written constitutions, he expressed best the rule that should guide this Court's consideration of the present controversy:

> Our security is in the possession of written Constitution. Let us not make it a blank paper by construction.[3]

The First Amendment bars Congress from making laws that abridge the freedom of speech. U.S. Const. amend. I. This Court has construed the Due Process Clause of the Fourteenth Amendment as incorporating the requirements of the free speech clause of the First Amendment, *see, e.g., United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 831 (1983) ("The First Amendment, which by virtue of the Due Process Clause of the Fourteenth Amendment now applies to state governments and their officials, prohibits either Congress or a State from making any 'law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble'").[4]

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2. JEFFERSON: POLITICAL WRITINGS at 373-74 (Appleby and Ball ed. 1999).

3. JEFFERSON, *supra* n.2, at 374.

4. *See also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("[w]e hold that the statute, as construed and applied to the appellants,

The effect of that incorporation is that the same restrictions that bar the Congress from abridging the freedom of speech bar the States, including Minnesota, from doing so, *see id.* In the present case, it is pressed by the Petitioners, and correctly in the view of this Amicus, that the right to freedom of speech incorporated into the Fourteenth Amendment bars the State of Minnesota from threatening judicial candidates with discipline and disbarment for the entirely appropriate political act of expressing their views on disputed legal or political issues. A result under which judicial candidates continue to be barred from announcing their views on disputed legal and political questions will have made, by construction of them, blank pages of the First and Fourteenth Amendments.

This amicus is particularly concerned that the right of the electorate to inquire about the legal and political views of judicial candidates be considered in the resolution of this dispute. This Court has often described the right to freedom of speech in terms sensitive to the right of auditors to hear, to read, and to learn. *See, e.g., Board of Education v. Pico*, 457 U.S. 853 (1982); *cf. Meyer v. Nebraska*, 262 U.S. 390 (1923) (freedom of inquiry protected under the Due Process Clause). In the present case, although the voters of Minnesota are not prohibited by law from inquiring about the political and legal opinions of judicial candidates, their questions can never be answered. As a result, voters are left to exercise their precious franchise in a dark that is deeper than the night.

Nor can it be surprising when such an uncommonly silly law

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deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment").

is inflicted on the rights of the people of a republic that anomalous consequences demonstrate the foolhardiness and inconstancy of the law. In the present case, as we demonstrate, the *effect* of the challenged provision of the Code is not to silence all candidates for judicial office. Instead, as we will show, incumbent judges remain free to express their opinions on disputed legal and political issues, but challenging candidates for office are forced to stand mute.

ARGUMENT

I. AGAINST EVERY PRINCIPLE OF SOUND, REPUBLICAN GOVERNMENT, THE "ANNOUNCE" RULE PREVENTS THE ELECTORATE FROM LEARNING FROM CANDIDATES FOR JUDICIAL OFFICE THEIR VIEWS ON MATTERS OF GREAT PUBLIC IMPORTANCE

In their genius, the Framers of the United States Constitution embedded in that great document a guarantee that every State would continually exist under a republican form of government. U.S. Const. art. IV, § 4. "Republican" indicates a form of government "having the characteristics of a republic"[5] In turn, "republic" describes "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law . . . ."[6] Thus, at heart, that guarantee

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5. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, at 1928 ("WEBSTER'S").

6. WEBSTER'S, *supra* n.5, at 1928. *See also* JEFFERSON, *supra* n.2, at 207 (defining a "republic" as "a government by its citizens in mass, acting directly and personally, according to rules established by the Majority; and that every other government is more or less

means that those who vote will have the means to determine whether the candidates of their choosing do, in fact, represent their views and opinions.

In prior cases considering constitutional challenges to restrictions on campaign speech this Court has demonstrated the appropriate sensitivity to the important rights of the electorate. In *Eu vs. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989), for example, this court discounted the interest of the state of California in suppressing campaign related speech of political parties. There, the ban on party endorsements of primary candidates, "directly affect[ed] speech which 'is at the core of our electoral process and of the First Amendment freedoms.'" *Eu*, 489 U.S. at 222-23 (citing case). Because, as this Court has said, "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office[,]" *id.* at 223 (citing cases), the California restriction was subject to the most severe scrutiny. In like vein, the Minnesota Code of Judicial Conduct, which not only affects, but directly targets, speech at the core of the electoral process and of the First Amendment, must be so scrutinized.

Minnesota's "highly paternalistic approach," *Eu*, 489 U.S. at 223 (internal quotation marks omitted), prohibiting candidates from announcing their views on disputed legal or political issues, "is generally suspect," 489 U.S. at 223-24 (citing cases), and patently anti-democratic. Minnesota acts as a censor, deciding what information is appropriate for a voter to consider

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republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens"). *Cf. United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances").

in selecting judicial candidates. There is one fact, however, that the State of Minnesota treats as essential information for every voter in a judicial election, namely the status of *incumbent* candidates as such.[7] The identification of incumbent status is, purportedly, provided only in judicial elections, *id.* Perhaps the State of Minnesota has discovered a fact about incumbency and voters that can be made to speak volumes with that one word. It seems more likely that, while silencing the discussion of views and opinions on disputed legal and political issues, the State is commending experience on the job as the important consideration for voters.

Still more disturbing, the State of Minnesota has concluded that it is appropriate to restrict the flow of information to voters by silencing candidates for judicial office. The day has long since passed when a State might claim to this Court that such a restriction on the flow of information "enhanc[es]the ability of its citizenry to make wise decisions . . . ." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 221 (1986). Clearly, the challenged provision of the Minnesota Code of Judicial Conduct is incapable of being described as anything other than an anti-democratic cloak designed to draw an impenetrable darkness down over judicial candidates with the result that Minnesota's voters cast ballots with all the effectiveness of shots in the dark.

II. IN PRACTICE, THE "ANNOUNCE" RULE INEQUITABLY SILENCES CHALLENGERS FOR JUDICIAL OFFICE BUT DOES NOT SILENCE INCUMBENT CANDIDATES.

Under the Minnesota Code of Judicial Conduct,

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7. *See* D.J. Tice, "What's In a Name," St. Paul Pioneer Press, Aug. 3, 2000, at 20A.

> A candidate for a judicial office, including an incumbent judge . . . shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent . . . .

Canon 5A(3)(d)(i), Minnesota Code of Judicial Conduct. In the present litigation, challenges to the "announce" clause are founded on the First and Fourteenth Amendment. Modestly complicating this matter, below, federal courts were put in the position to forecast the likely construction of the Canon if it were to be taken up for consideration by the Minnesota courts. *See Republican Party of Minnesota v. Kelly*, 63 F. Supp.2d 967, 983-86 (D. Minn. 1999); *Republican Party v. Kelly*, 247 F.3d 854, 881-83 (8th Cir. 2001). The trial court acknowledged the difficulties presented by the announce clause; in fact, that court concluded that it would be necessary to narrowly construe the announce clause in order to prevent its invalidation. 63 F. Supp.2d at 983-86. The narrow construction that the trial court gave to the announce clause limited its application so that it barred only the expression of views on issues of law and politics likely to come before the court to which the candidate seeks election. *Id.*

In doing so, the trial court may have identified a construction of the statute more closely related to its purported purposes than is found by a facial reading of the statute. But the constitutional defects remain. An important consideration is the disparate impact that the announce clause causes. The Code purports to treat challengers and incumbents identically. But, in fact, the Canon silences challengers while leaving incumbents free to announce their views on disputed legal or political issues.

While it is true that voters are free to ask judicial candidates their views on disputed legal and political questions, no candidate is permitted to respond to such inquiries in a way that "announces" his view on disputed matters of law and politics. But *incumbent* candidates in Minnesota flagrantly violate the ban on "announcing" their views on disputed matters of law and policy. Their violations take the form of written orders and opinions published in decisions of Minnesota's courts, published during the period of time in which such incumbents are announced candidates for reelection.[8]

That the Canon in fact puts incumbents and challengers in quite different positions from each other is readily demonstrated by examining the actual circumstances of the November 2000 general election in Minnesota. During that election, four sitting justices of the Minnesota Supreme Court declared themselves candidates for reelection: Chief Justice Blatz, and Justices Gilbert, Lancaster, and Russell Anderson.[9] While declared candidates for judicial reelection, Canon 5A(3)(d)(i) barred these judges from announcing their views on disputed matters of law

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8. So that no doubt can be left on this point, this amicus does not seek to suggest that the judges and justices of Minnesota's courts should be barred, while standing for reelection, from carrying out their constitutional and statutory duties. Instead, the point to be drawn from the circumstances identified in this argument is that Minnesota's uncommonly silly law does not treat all qualified candidates the same and, to avoid its application in fact to announcements made by *incumbent* judges, Minnesota must ignore the patent application of the statute.

9. *See* "Judges are elected to six-year terms in nonpartisan races," Minneapolis Star Tribune, Voter's Guide (insert) at 31 (Nov. 3, 2000) (identifying candidates for judicial posts).

and politics. In fact, as these amici will demonstrate below, each of the incumbents announced their views on disputed matters of law and politics. Worse than those violations, the bare existence of the announce clause and the threat of enforcement forced each challenging candidate to maintain a severe silence while the views of their opponents were not only announced, they were published by the agencies of the State.

Despite the provisions of the Minnesota Code of Judicial Conduct, Minnesota voters were free to select judicial candidates based upon the positions of those candidates on important questions of law and politics, even ones in serious dispute. It could hardly be surprising to learn that voters cared about the positions candidates hold on crime, the economy, privacy, and other important issues. To the extent that a candidate expressed his view on disputed issues of law or politics, however, he risked the imposition of legal sanctions. The sole exception to the Code is one *in fact* by which sitting judges who are declared candidates announce their views on disputed legal and political questions by deciding cases but are not investigated or disciplined for doing so.

During the campaign season, while he is a candidate for a trial court bench, a challenger might announce that there is too great laxity in the practice of judges when sentencing violent criminals; or the challenger might express the view that a tax or an assessment should, or should not, have been imposed on a special district. These views, and countless others, from mundane questions of court management questions to questions of life and death, expressed in terms of law and politics, might be announced. But if those views are announced, then the challenger is in apparent violation of Canon 5A(3)(d)(i), and may be subject to investigation and discipline.

But during the election cycle leading to the general elections

of November 2000, Chief Justice Blatz, and Justices Anderson, Gilbert and Ferguson announced their views on such questions without any consequent discipline. They announced these views by authoring opinions for the Minnesota Supreme Court, or in concurrence with the Court, or in dissent from it. And even when all they did was join the opinions of others, the act of joining the opinion of another gives rise to a presumption that the view expressed in the opinion is shared by those that join.

Justice Anderson, a declared candidate for reelection, for example, did not stand on a speaker's platform at the convention of a political party and announce his support for a no-nonsense, get-tough-on-crime policy. But he did author the opinion for the Minnesota Supreme Court in *Minnesota v. Wasson*, 615 N.W.2d 316 (Minn. 2000). In that case, in an opinion by Justice Anderson, the Minnesota Supreme Court upheld an unannounced, no-knock search which produced the evidence (drugs and weapons) which formed the basis of appellant's conviction. *Id.* To the reasonable mind, Justice Anderson's opinion for the Court "announces" his preference for a lighter burden of proof on police for their reliance on the reasonable suspicion exception to the knock and announce requirement of the Fourth Amendment. Such an announced view might, perhaps, stand a candidate in quite good stead with an electorate haunted by concerns about crime.

Of course, not everyone shares the view that criminals are being molly-coddled. For the voter who is concerned that judges are being overly harsh to criminals or being overly generous to prosecutors in their rulings on disputes in criminal matters, it is matter of some moment what views a judicial candidate hold regarding these questions. While his challenger was silenced by law, Justice Gilbert, dissenting in *Wasson*, "announced" that he would have required a higher showing of reasonable suspicion for a no-knock search and that, in his opinion, the circumstances

of the case were insufficient to outweigh the constitutional guarantee of the expectation of privacy and sanctity of the home in the Fourth Amendment. *Id.* at 323. And although Justice Gilbert was free to announce this view in an obviously disputed matter of law, his election opponent was unable to announce his view regarding Justice Gilbert's position in an appeal to those Minnesotans whose concerns did not include insuring that criminals had a cakewalk in court.

In a similar vein, Justice Anderson again was able to announce his views on a disputed legal matter, and also to prove his no-nonsense approach to crime in *Ademodi v. Minnesota*, 616 N.W.2d 716 (Minn. 2000). In *Ademodi*, in an opinion by Justice Anderson, the Minnesota Supreme Court rejected a fundamental fairness claim raised on appeal by a foreign national and refused to exercise its discretion to consider the case on the merits. Ademodi had failed to raise a claim under the Vienna Convention on direct appeal and sought to raise it before the Minnesota Supreme Court. Under the Vienna Convention, a state must inform a consulate that its national has been arrested or is in custody. The Minnesota Supreme Court had held previously that it could consider a claim not raised on direct appeal "in limited situations when fairness so requires and when the petitioner did not deliberately and inexcusably fail to raise the issue." *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997). But Justice Anderson declined to do so, and instead, the Court remanded a separate claim of ineffective counsel as the appropriate resolution of the appeal. 616 N.W.2d at 719.

During the 2000 election season, a declared challenger for the position of Justice on the Minnesota Supreme Court might also have wanted to announce a like view regarding the question of fundamental fairness. Explaining to potential supporters his views on disputed legal and political questions might well be viewed by such a challenging candidate as the best and

appropriate way to demonstrate his fitness and qualification for judicial office. Unlike Justice Anderson, however, such a challenger would be in violation of Canon 5A(3)(d)(i) and risking legal sanctions by doing so.

In *Minnesota v. Schmidt*, 612 N.W.2d 871 (Minn. 2000), Justice Anderson again announced his views on a disputed legal issue, and in doing so was able to demonstrate to the electorate his law and order mien. Schmidt appealed from his conviction on the basis that the prosecution presented an instance of double jeopardy. After Schmidt was convicted of stalking, the statute under which Schmidt was charged was declared unconstitutional; the state then retried him under a separate statutory subsection. Justice Anderson rejected the double jeopardy claim, concluding, "where a conviction is overturned on appeal due to the unconstitutionality of the charging statute, prosecuting the defendant under a different statute is not the sort of governmental oppression against which double jeopardy was intended to protect criminal defendants." 612 N.W.2d at 876 (citation omitted).

Again, an election challenger might see the value in announcing his view that retrial in such cases should not be considered a form of double jeopardy – or he might conclude that it was double jeopardy and want voters to know that view. If a challenger published a letter to the editor of a local newspaper expressing either view, however, he would be in patent violation of the Minnesota Code of Judicial Conduct.

Nor was Justice Anderson the sole incumbent candidate to have the benefit of his position on the bench in making "protected" announcements of his views on disputed legal and political matters. The question of race and considerations of race in the exercise of peremptory strikes is one that has presented great controversy and has even been the source of

dispute and contention in this Court. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986). And, unsurprisingly, this fertile source of dispute over law politics has come before the Minnesota Supreme Court.

While he was a declared *incumbent* candidate during the 2000 election cycle, Justice Gilbert authored the majority opinion in *Minnesota v. Martin*, 614 N.W.2d 214 (Minn. 2000). In Martin, appellant challenged his murder conviction on the ground that the State exercised its peremptory strikes in a racially discriminatory manner when it struck the lone African-American from the jury pool. 614 N.W.2d at 221. Based on race-neutral justifications offered by the prosecutor (members of the juror's family had been or were currently in prison) and the considerable deference given to the trial court's credibility determinations, Justice Gilbert, for the Court, announced the view that the appellant failed to show that the prosecutor acted with discriminatory intent. Specifically, Justice Gilbert rejected appellant's argument that such exclusions disparately impact African Americans "because African Americans are more frequently arrested and more often have criminal records because of the scrutiny they face from the predominantly white police force." 614 N.W.2d at 223. Despite announcing his view on this contentious and controversial legal and political issue (one that must certainly be of the kind likely to come before the courts), Justice Gilbert was not investigated or disciplined for violating the Minnesota Code of Judicial Conduct.

Of course, questions of criminal law and procedure are not the only disputed legal and political matters that judges on Minnesota's courts face. Nor are they the only matters about which *incumbents* announce their views despite the restrictions of Canon 5A(3)(d)(i).

Domestic relations law provides another fertile field for

contention and dispute. As was demonstrated when this Court considered and decided *Troxel v. Granville*, 530 U.S. 57 (2000), questions of custody, visitation, and support, stir the people of this Nation as deeply as any issue. While she was standing for reelection during the 2000 election cycle, Chief Justice Blatz announced her view on a disputed legal matter regarding the termination of parental rights. In *In the Matter of the Welfare of: G.L.H., G.E.H., Jr.*, 614 N.W.2d 718 (Minn. 2000), Chief Justice Blatz rejected an appeal by a mother whose rights had been terminated. In that case, in the trial court, on the day of her termination of parental rights trial, the respondent fired the public defender who had represented her for over a year. The disputed issue on appeal was whether the statutory right to counsel in termination proceedings was analogous to the constitutional right to counsel possessed by criminal defendants. If so, the mother argued, a formal waiver procedure was required to ensure that the waiver of counsel is voluntary and intelligent. 614 N.W.2d at 720. Chief Justice Blatz rejected the analogy, explaining that a statutory right is not equivalent to a constitutional right and that the right to appointed counsel only exists when the litigant may be deprived of physical liberty. 614 N.W.2d at 722.

Of course, reasonable minds might disagree on the question answered by Chief Justice Blatz. But whether a challenger shared Chief Justice's Blatz's view, or rejected it, he could not announce his view on the question while a declared candidate for judicial office. Chief Justice Blatz did.

Just as certain as death, taxes nonetheless present moments of high controversy and heated dispute, both as political questions and legal ones. And Chief Justice Blatz took the opportunity presented by the Minnesota Supreme Court's decision in *In re Improvement of Murray County Ditch No. 34*, 615 N.W.2d 40 (Minn. 2000), to announce her views on a disputed legal and

political question *in an opinion dissenting from the views of the majority of the Court*. There, the Court upheld an administrative decision to assess benefitted property owners only for improvements done to a deteriorating drainage ditch in need of repair. The majority announced the view that the drainage authority correctly applied Minn. Stat. §§ 103E.215 (6), as the improvement was to a separable portion of the ditch. In dissent, Chief Justice Blatz announced her view that the record before the court did not support the conclusion that the improvement project was separable from the remainder of the drainage system.

Few candidates for elective office miss the value of easing the burden of taxes, or at least, the value of expressing the view that such burdens should be eased. The majority in *In re Improvement of Murray County Ditch No. 34*, might have preferred to abstain, or to have held its decision until after the election cycle. But, by doing its duty, the Minnesota Supreme Court created the opportunity for Chief Justice Blatz to announce her views *in dissent* on this disputed matter. Of course, had the challenger for her position on the court announced a like view, or disagreed with her conclusions, as part of his campaign for office, he would have been in patent violation of the Minnesota Code of Judicial Conduct.

* * * *

In each of the foregoing cases, *incumbents* announced their views on disputed legal and political questions. None of the incumbent candidates on the Minnesota Supreme Court was investigated or disciplined as a consequence of doing so. Because of the opportunity to announce their views in writing by deciding cases, *incumbent* candidates receive a special benefit from the operation of Canon 5A(3)(d)(i). But Canon 5A(3)(d)(i) hangs precipitously over *challengers*, virtually insuring that voters will be deprived of the opportunity to have their questions

about the views of such candidates on disputed questions of law and politics answered.[10]

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals should be reversed.

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10. The foregoing discussion does not bring to account the four sitting judges of the Minnesota Court of Appeals who were declared candidates for reelection during the 2000 election cycle: Judges Harten, Anderson, Shumaker, and Halbrooks. Each of these *incumbent* judicial candidates on Minnesota's intermediate appellate court announced their views on disputed legal and political questions in areas of high controversy and public contention. *See, e.g., State v. Reece*, 615 N.W.2d 852 (Minn. Ct. App. 2000) (departures from state sentencing guidelines); *State v. Baumann*, 616 N.W.2d 771 (Minn. Ct. App. 2000) (vehicle stops for DWI); *Halverson v. Taflin*, 617 N.W.2d 448 (Minn. Ct. App. 2000) (child custody); *In re Welfare of C.P.K.*, 615 N.W.2d 832 (Minn. Ct. App. 2000) (cross burning and the right to freedom of speech); *Roquemore v. State Farm Mut. Auto. Ins. Co.*, 610 N.W.2d 694 (Minn. Ct. App. 2000) (economic injury and tort law); *Brown v. State*, 617 N.W.2d 421 (Minn. Ct. App. 2000) (distribution of Minnesota's settlement with tobacco companies).

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IN THE

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REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE [1]

The Chamber of Commerce of the United States ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. A central function of the Chamber is to represent the interests

[1] All parties have consented to the filing of this brief *amicus curiae*, as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

of its members in important matters before the courts, legislatures, and executive branches of state and federal governments. In so doing, the Chamber regularly files briefs *amicus curiae* in numerous cases vital to the business community, including cases pertaining to political speech. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Elections Bd. of Wisconsin v. Wisconsin Mfrs. and Commerce*, 597 N.W.2d 721 (1999), *cert. denied*, 528 U.S. 969 (1999). The Chamber also has litigated to preserve its own First Amendment rights of speech and association. *See Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

In order to properly represent its members' interests, the Chamber collects and disseminates information about public issues and officials. In particular, the Chamber has a long-standing interest in reforming state judiciaries. In 1998, it established the Institute for Legal Reform ("ILR"), an affiliated not-for-profit organization devoted exclusively to judicial reform. The ILR is extremely active in raising awareness among the Chamber's members and the public at-large about the business-related issues surrounding the courts, judges, and candidates running for judicial and other public offices. Chamber members rely on the information provided by the Chamber and the ILR to form opinions about the judiciary, including candidates. In addition, the information allows the Chamber's members to assess whether Chamber and ILR activities are truly representative of the members' interests.

The issues at stake in this case are of direct concern to the Chamber and its members. The Chamber is committed to ensuring that state judiciaries remain impartial arbiters of the law. However, when state legislatures submit the selection of judges to the electorate, the voters must be afforded access to relevant information about the candidates. In upholding the "announce" clause of the Minnesota Code of Judicial Conduct, the Court of Appeals for the Eighth Circuit

reinforced a restriction on candidate information necessary for the public to make informed electoral decisions. The Chamber and its members have a strong interest in maintaining their constitutional right to receive truthful non-prejudicial information in order to intelligently participate in American democracy.

SUMMARY OF ARGUMENT

For the Chamber to exercise its First Amendment right to disseminate information about judicial candidates, its First Amendment right to receive information from judicial candidates and incumbents may not be restricted. The announce clause is a direct violation of this right. Furthermore, even if the "announce" clause is upheld, its speech restrictions must be expressly limited to ensure that the Chamber's First Amendment right to independently disseminate information about the judiciary is not infringed.

ARGUMENT

The Minnesota Code of Judicial Conduct's "announce" clause forbids a candidate for election to judicial office to "announce his or her views on disputed legal or political issues." Minnesota Code of Judicial Conduct; Canon 5A(3)(d)(i). Thus, judicial candidates are relegated to saying, for example, that they will "protect constitutional rights." Statements about "the proper role of stare decisis, narrow or strict construction, original intent and substantive due process" are banned. *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 894 (8th Cir. 2001) (Beam, J., dissenting). This is so even though candidates' views may otherwise be public. Perhaps an incumbent judge has already written a judicial opinion on the matter, or a candidate has previously authored an article in which he or she has stated a view. Yet, Canon 5 prohibits truthful statements by candidates about their political, legal, and ideological views. It does not prohibit them from having such views.

Thirty-nine of the fifty states have chosen to elect their judges. *See* Roy A. Schotland, *Introduction: Personal Views*, 34 Loy. L.A. L. Rev. 1361, 1365 (2001). Of 1,243 state appellate judges, fifty-three percent face contestable elections for initial terms. *Id.* Of 8,489 state trial court judges of general jurisdiction, seventy-six percent face some form of contestable election for initial terms. *Id.* Eighty-seven percent of all state appellate and trial judges face some sort of election for subsequent terms. *Id.*

Included in these statistics are members of Minnesota's judiciary. The important civic duty of voting obligates voters, like Minnesota voters, to obtain information about judicial candidates. Civic organizations, like the Chamber, participate in the dissemination of such information. There are candidates, like petitioner Gregory Wersal, who are willing to help citizens carry out this responsibility by providing relevant information to the public. Yet, the "announce" clause forbids them from doing so.

The public, including the Chamber and its members, are left to rely on speculation and inference. The "announce" clause prohibits the flow of more direct and substantial information because it limits judicial candidate campaign speech to mere platitudes. In addition, speech by independent third parties is equally ineffectual in aiding voters because third parties must rely on the same inadequate information.

This result is in direct conflict with the free speech rights ensured by the First Amendment.

I. THE "ANNOUNCE" CLAUSE VIOLATES THE FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION FROM A WILLING SPEAKER.

Freedom of speech not only entails the right to speak freely, but the right to receive information. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("the

First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom (of speech and press) . . . necessarily protects the right to receive it."). In particular, the First Amendment protects the right to receive political, social, and other information related to the functioning of government, see *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)), including information about "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). Without such a right, the First Amendment's universally recognized purpose of free discussion of public affairs in which truth will ultimately prevail cannot be achieved. *See id.*; *Kleindienst*, 408 U.S. at 763 (1972) (citing *Red Lion Broad. Co.*, 395 U.S. at 390). When free and truthful discussion about government affairs is stifled, this country's fundamental principal of self-governance is sacrificed. *See Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

The "announce" clause unreasonably restricts information about judicial candidates to the public in violation of the public's constitutional right to receive such information. By treading on this right, the "announce" clause has artificially limited public debate about the judiciary and its members at a level far below that envisioned by the First Amendment or that which is necessary to preserve the independence of the judiciary. The First Amendment's purpose in fostering vigorous public debate about all three branches of government is to maximize the democratic nature of government. The "announce" clause's limitation on public access to information about the judiciary and its members directly and unreasonably limits debate about public affairs.

Of course, First Amendment protections are not absolute. Compelling governmental interests exist to restrict some speech of judicial candidates and incumbents, and can perhaps justify a corresponding restriction on the ability of the public to receive such speech. In particular, if judges or candidates for the bench make promises to decide cases in a certain way, litigants who appear before them may be denied their due process right to a fair and impartial trial (though recusal procedures often may be a more tailored and less intrusive remedy that does not infringe upon First Amendment rights). The Minnesota Code of Judicial Conduct addresses restrictions of this type in Canon 5A(3)(d)(i) which prohibits "pledges and promises." The court below justified the much broader "announce" clause with the same due process rationale, concluding that the "announce" clause is necessary to "reach the full range of campaign activity that can undermine the State's interests in an independent and impartial judiciary." *Republican Party of Minnesota*, 247 F.3d at 877.

However, the same state interest in an independent and impartial judiciary that justifies the narrower restriction on "pledges and promises" found in Canon 5A(3)(d)(i) cannot similarly justify the "announce" clause's much more sweeping prohibition on *all* speech regarding "disputed legal or political issues." The "announce" clause casts its net far too wide to survive constitutional scrutiny.[2] As recognized by the Seventh Circuit Court of Appeals, "[t]here is almost no legal or political issue that is unlikely to come before a judge

[2] The overbreadth of the "announce" clause was implicitly recognized by the American Bar Association which amended a similar provision of its Model Code of Judicial Conduct by limiting its reach to "'statements that *commit or appear to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court.'" *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 879-80 (8th Cir. 2001) (emphasis added).

of an American court." *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (1993). Therefore, the "announce" clause prohibits almost all speech by incumbents and candidates, the content of which is critical to public discussion, evaluation, and voting. By decreasing the flow of information to the public, the "announce" clause does more harm to public debate about the judiciary than good to the due process rights of future litigants.

The "announce" clause diminishes constitutionally protected discussion of the judiciary in another, more subtle way. The "announce" clause eliminates the most accurate and useful sources of information about the judiciary, *i.e.*, the candidates. The result is that the truthfulness and integrity of public discussion about the judiciary is compromised because public debate is left to secondary and less knowledgeable speakers, third parties who are independent of a candidate or her campaign. Independent speakers may be less informed because they must glean information about judicial candidates from sources other than the primary ones. The inevitable result is that debate about the judiciary is fueled by information that may be incomplete, inaccurate, or unreliable. The First Amendment's objective to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail is thereby thwarted.

II. ANY HOLDING THAT THE "ANNOUNCE" CLAUSE IS CONSTITUTIONAL CANNOT JUSTIFY SIMILAR CONTENT RESTRICTIONS ON THE SPEECH OF INDEPENDENT THIRD PARTIES.

Any holding that the "announce" clause is constitutional should be limited to the speech of candidates for judicial office and not to the speech of independent third parties.[3]

[3] Though *certiorari* was granted only with respect to the "announce" clause and its effect on incumbents and candidates in judicial elections,

The First Amendment protections separately afforded independent third party speech in the electoral and judicial speech contexts are some of the strongest and most important known to American law. These two separate lines of jurisprudence necessitate that any holding permitting content-based restrictions on judicial candidate speech must be clearly demarcated to avoid inhibiting similar speech by independent third parties.

A. Electoral speech by independent third parties is core First Amendment speech required by the public to make informed electoral decisions.

Prohibitions on electoral speech by independent third parties are unconstitutional because they limit "the ability of the citizenry to make informed choices among candidates for office." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).[4] This Court has "recognized repeatedly that 'debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.'" *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989) (quoting *Buckley*, 424 U.S. at 14). The only government interest compelling enough to justify restricting expenditures for electoral speech is the possibility of corruption or the appearance thereof. *See Buckley*, 424 U.S. at 45. However, corruption is impossible when expenditures for speech by third parties are made independent

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the precedential effect of a decision generally upholding the "announce" clause could be interpreted as a basis upon which the speech rights of independent third parties may also be restricted.

[4] The only exception to this categorical rule is that speech by corporations or labor organizations that includes express words of advocacy of the election or defeat of clearly identified candidates can be constitutionally regulated. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) (interpreting 2 U.S.C. § 441b).

of the candidates. *See id.* at 47-48 ("[u]nlike contributions, . . . independent expend-itures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive" thereby "alleviat[ing] the danger that expenditures will be given as a quid pro quo"). As core First Amendment expression, independent third party electoral speech receives the highest constitutional protection. *See id.*

In the event that the Court determines that judicial candidate speech can be constitutionally restricted, the line between candidate speech and speech by independent third parties must be clearly demarcated. A ruling without such a bright-line distinction might be read to permit restrictions on electoral speech by independent third parties. Such restrictions would offend the First Amendment by suppressing core expressive activity and inhibiting the ability of the American people to comment on issues raised by judicial campaigns and to make informed electoral decisions.

B. Discussion of the judiciary by independent third parties is fundamental First Amendment speech necessary for adequate public scrutiny of government institutions.

The First Amendment prohibits restrictions on independent third party speech about the judiciary because "operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality). The purpose of such vigorous First Amendment protection is to allow for public scrutiny of judicial affairs in order to guard against miscarriages of justice. *See Landmark Communications*, 435 U.S. at 839; *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Public scrutiny of the judiciary allows the citizenry to act as "the final judge of the proper conduct

of public business," a role "of critical importance to our type of government." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

As recognized by the court below, First Amendment protection of independent third party judicial speech, and speech about judicial candidates in particular, is nearly absolute. "'The governme... does not and cannot have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates for [judicial] offices.'" *Republican Party of Minnesota*, 247 F.3d at 874 (quoting *California Democratic Party v. Lungren*, 919 F. Supp. 1397, 1402 (N.D. Cal. 1996)).

In addition, the government's interest in "judicial integrity" cannot justify limiting independent speech by third parties. A state's interest in "judicial integrity" is based on the notion that the government may regulate physical conduct that interferes with the orderly administration of justice. *See Cox v. Louisiana*, 379 U.S. 559, 562 (1965), *reh'g denied*, 380 U.S. 926 (1965). Therefore, "judicial integrity" can only justify restrictions in the form of "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important government interest unrelated to the restriction of communication." *Buckley v. Valeo*, 424 U.S. 1, 18 (1976) (citing *Cox v. Louisiana*, 379 U.S. 559 (1965)).

Any restriction on judicial speech must be strictly confined to judicial candidates. A holding that can be construed to limit speech of independent third parties will directly conflict with the First Amendment and this Court's precedents that ensure free and robust public commentary about the judiciary. More significantly, limitations on independent third party speech will result in a less informed citizenry ill equipped to maintain a vigilant watch over the government.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Petitioners,

v.

KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE IDAHO CONSERVATION LEAGUE AND THE LOUISIANA ENVIRONMENTAL ACTION NETWORK IN SUPPORT OF NEITHER SIDE

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INTERESTS OF *AMICI CURIAE*

Amici curiae are environmental organizations which participate in litigation in the state courts. *Amici* have an interest in this case because the judicial election systems in some states threaten to undermine their rights and the rights of their members under the Due Process Clause to fair and impartial justice. (*Amici* and their interests in state judicial elections are set forth in greater detail in the appendix).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

> "Independence means you decide according to the law and the facts. Law and facts do not include deciding according to campaign contributions. And if that's what people think, that threatens the institution of the judiciary. To threaten the institution is to threaten fair administration of justice and protection of liberty."
>
> Justice Stephen Breyer[2]

The First Amendment issues in this case, though unquestionably important, illuminate only a narrow aspect of a larger problem: the extreme politicization of

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[1] Counsel for the parties have consented to the filing of this brief, as indicated in a letter lodged with the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, made a monetary contribution to the brief's preparation or submission. *See* Rule 37.

[2] Frontline: Justice for Sale (PBS television broadcast, November 23, 1999).

the elected state judicial systems and the fundamental due process issue that this relatively new political phenomenon creates. *Amici* submit this brief in an effort to assist the Court in evaluating the larger historical, political, and legal contexts from which this case arises.

Over the last several decades, and especially in the last few years, judicial elections in a number of states have become indistinguishable from the rest of the American political process, complete with large campaign contributions, "independent expenditures" by special-interest groups, raucous personal and partisan attacks on candidates, and massive television and print advertising. The high cost of judicial campaigns has created the widespread public belief that "justice is for sale," undermining both the state courts as institutions and the impartial administration of justice. A recent development of particular concern to *amici* is the nationwide campaign by certain elements of the business community to alter the composition of the state courts with the express goal of altering the law on, among other subjects, the environment. In several recent high-profile environmental cases, the evidence strongly supports the inference that the outcomes were determined by aggressive electoral political activity, rather than by the law or the facts in the particular cases.

The *amici* take no position on the First Amendment issues in this case. Nonetheless, the evidence presented in this brief relating to the politicization of the state court systems may be relevant to the resolution of these issues. Restrictions on speech and political activity must serve a "compelling" purpose and must be "narrowly tailored"

to achieve the stated purpose. Protecting judicial independence and impartiality is unquestionably a compelling purpose. But there appears to be a substantial question in many states, including Minnesota, whether regulating speech and other political activities of judicial candidates can actually achieve this purpose. Given that judicial independence and impartiality already are severely compromised by other types of political activity, it is debatable whether these important judicial attributes can be preserved by restrictions which focus narrowly on candidates' speech and political activities. In addition, it is also debatable whether restrictions on speech and political activity by judicial candidates can meet the requirement that restrictions on First Amendment freedoms be narrowly tailored. Like some other states and the federal government, Minnesota could adopt the appointive, "merit selection" approach, which would protect the independence and impartiality of the courts, without the need to restrict First Amendment freedoms.

Finally, the more fundamental constitutional issue raised by this case is whether the selection of judges at the ballot box, especially in light of the relatively recent, extreme politicization of judicial election contests, comports with the requirements of due process under the Fourteenth Amendment. The Court has repeatedly and jealously guarded the rights of litigants to impartial courts under the Due Process Clause. Before a citizen can be deprived of a protected interest, he or she is entitled to a judge who is not in a situation which will offer a "possible temptation" which would lead the judge "not to hold the balance nice, clear, and true." In enforcing this guarantee, the Court has emphasized that the appearance

of impartial justice is just as important as the reality. Increasingly, the elected courts in many states do not meet this constitutional standard. The Court should take this opportunity to sound the alarm about the increasingly fragile justice system in many state courts.

ARGUMENT

I. Special Interests Engage in Extensive Political Activity in State Judicial Elections In Order to Influence the Outcome of State Court Cases and to Change the Content of the Law.

A. The Politicization of the State Judicial Electoral Process.

Judges stand for election of some type in thirty-nine states.[3] Partisan elections are conducted in sixteen states; nonpartisan elections are held in seventeen states; and twenty states hold "retention" elections in which sitting judges are on the ballot seeking "yes" votes for another term but there is no direct opponent. In other states, the governor appoints judges; and in yet others the governor appoints judges with the concurrence of the legislative branch, as in the federal system.

[3] *See* 2 ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates 7 (1998); *see also* John D. Echeverria, "Changing the Rules By Changing the Players: The Environmental Issue in State Judicial Elections," 9 N.Y.U. ENVTL. L. REV. 217, 302-03 Appendix (2001) (updating ABA data for Arkansas and Idaho).

Elected state judiciaries are generally viewed as a product of nineteenth century Americans' enthusiasm for direct democracy. "The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process in America. It was spearheaded by reformers who contended that the concept of an elitist judiciary . . . did not square with the ideology of government under popular control."[4] As a result, a number of states converted to an electoral process, and between 1846 and 1912 every new state that joined the union established an elected judiciary.

In the past, by tradition if not by law, state judicial elections were relatively low key.[5] Campaigns were inexpensive, candidates did not solicit campaign contributions from those who might appear before the courts, and candidates avoided discussions of how they might rule on particular legal issues. Independent groups, with the exception of the state bar associations, did not participate in any meaningful fashion. For better or for worse, judicial elections were largely devoid of substantive content. Elections, when they were contested at all, were generally determined by the candidates' public reputations, the public's familiarity with the candidates, or even the attractiveness of a candidate's name.

[4] Philip L. DuBois, FROM BALLOT TO BENCH, JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 3 (1980).

[5] *See generally* UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS; THE REPORTS OF CITIZENS FOR INDEPENDENT COURTS 87-88 (1999).

Today, unfortunately, state judicial elections are essentially indistinguishable from the rest of the American political process, complete with large campaign contributions, "independent expenditures," raucous personal and partisan attacks on candidates, and massive television and print advertising. Special interest participants in the process include law firms, associations of trial lawyers, labor unions, state chambers of commerce, and many others. For some groups, participation in the judicial electoral process is simply an extension of traditional political activity focusing on the legislative and executive branches.

The state judiciary represents the last, disappearing frontier in terms of big-money influence in American politics. The cost of judicial campaigns has increased at a gallop; according to a 1998 report, judicial campaign costs for the Wisconsin Supreme Court increased by 800% since 1979, and judicial election costs increased by the same factor in Alabama since 1986.[6] In November 2000, during the last major round of state elections, expenditures reached a new all time high, especially by "independent" special interests. According to one estimate, entities other than candidates (including political parties) spent over $16,000,000 in the five states with the most expensive elections: Alabama, Illinois, Michigan, Mississippi, and Ohio.[7]

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[6] *See* Kyle Johnson, "Raising Money: Judges on the Campaign Trail," CHRISTIAN SCIENCE MONITOR, at A1 (August 13, 1998).

[7] *See* Roy A. Schotland, "Financing Judicial Elections," in FINANCING THE 2000 ELECTIONS (Magleby, ed., Brookings, forthcoming).

The high cost and contentiousness of many judicial elections has fostered the widespread belief that "justice is for sale" in many states. A recent national public opinion survey found that eighty-one percent of respondents believed that "[j]udges decisions are influenced by political considerations," and that seventy-eight percent believe "[e]lected judges are influenced by having to raise campaign funds."[8] These national survey results are confirmed by supportive data from numerous state-level surveys.[9]

Even before the recent, extreme politicization of the judicial electoral process, professional and academic opinion had turned against the concept of an elected judiciary. The American Bar Association has long favored moving towards merit appointment systems and otherwise limiting special-interest influence over judicial selection.[10] The American Judicature Society was originally established principally to pursue merit appointment.[11] This platform is based on the viewpoint that an electoral process is inherently political and that elections therefore necessarily undermine the independence and impartiality

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[8] *See* National Center for State Courts, How the Public Views the State Courts 41-42 (May 14, 1999).

[9] *See* Anthony Champagne, "Interest Groups and Judicial Elections," 34 LOY.L.A.L.REV. 1391, 1408 (2001) (collecting state polling data).

[10] *See generally* 2 ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates (1998).

[11] *See* American Judicature Society, Judicial Selection, at http://www.ajs.org/select.html.

of the courts. Notwithstanding this thinking, the judicial electoral process remains a robust institution in most states. Many reformers, discouraged at the prospect of eliminating state judicial elections through the political process, have turned to various "second best" solutions, such as increasing the transparency of election financing, promoting public funding of judicial elections, or (as illustrated by this case) controlling direct political advocacy by candidates for judicial office.

B. Business Community Efforts To Influence Judicial Elections.

In the last several years, elements of the business community have mounted a concerted campaign to influence the outcomes of state judicial races in order to change the content of state law on issues of importance to business. Environmental law has been at the forefront of this new effort.

The Oklahoma Group.[12] A group of Oklahoma-based lobbyists, lawyers and business people, many with close connections to Koch Industries, a large privately-held company with major interests in petrochemicals, was the initial leader of the effort. Probably not coincidentally, Koch Industries has been the target of numerous federal and state environmental enforcement actions, and recently paid the largest civil fine ever imposed for violations of U.S. environmental laws. Operating initially under the name "Citizens for Judicial Review" – and

[12] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 225-234.

subsequently as the "Economic Judicial Report" – the Oklahoma group created a nationwide franchising operation for pro-business advocacy in state judicial elections.

A 1996 fund-raising letter to various business leaders described the group's original plan. CJR proposed preparing state-by-state evaluations of the voting records of state judges and distributing the results to "pro-business opinion leaders." This project was needed, CJR contended, because "the judiciary has a dramatic and often-overlooked effect on investment and employment decisions made by businesses." The initiative would, among other things, address the problem that some businessmen "are unaware of the negative economic effects which can result from judges who maintain unsound economic ideologies [sic]." The proposal described a budget for the eight-state effort of $1 million, and indicated that "[a]ny additional dollars" above and beyond the $1 million would "go toward funding a $3.5 million national program." The letter predicted that the effort "will have a very significant impact on judicial behavior and create positive cost results in our state, region, and nation." The goal, in short, was to raise money to support political activity in order to change the content of the law and thereby improve conditions for business.

Since its formation, the Oklahoma group has been solely or partly responsible for producing judicial performance reports in at least eight states, including Alabama, Florida, Louisiana, Michigan, Mississippi, Oklahoma, Pennsylvania, and Texas. The reports evaluate judges' "pro-business" performance based on an analysis of how judges have decided a small sampling of cases in different subject areas, including environmental regulation,

employment, insurance, products liability, and so on. The rulings in each category are tabulated to produce an overall pro-business favorability rating, ranging from 100% pro-business to 0%. The evaluations treat judicial rulings as being indistinguishable from legislative votes, ignoring the fact that judges who conscientiously perform their duties may often arrive at results which they do not prefer as a matter of policy. The media in different states has given extensive coverage to these reports, and they have provided the basis for various organizations' decisions about which candidates to endorse.

U.S. Chamber of Commerce.[13] Apparently building upon the work initiated by the Oklahoma group, in 1998 the U.S. Chamber of Commerce formed the Institute for Legal Reform, one of the stated objectives of which is "rating and endorsing highly qualified candidates for judicial elections in certain key states."

An article published in summer 1999 provides a summary of the goals and objectives of the Institute. According to its president, the Institute was created because "[t]he Chamber realized that the business community was concerned" about what he called the "growing threat of abusive, frivolous and excessive litigation." The project had a steering committee made up of corporate leaders, with funding coming from "businesses around the country." The Institute conducts "media campaigns which include press releases, op-ed pieces, letters to the editor,

[13] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 235-37.

publishes pamphlets, holds conferences and even, on occasion, purchases ad time or space."

In June 2000, in its most ambitious effort yet, the Institute announced a campaign to support the election of "pro-business" judges to the state supreme courts in Alabama, Illinois, Michigan, Mississippi, and Ohio, and indicated that it expected to raise at least $10 million to support the effort. The executive director of the Institute reportedly stated that the Institute intended to use these funds to make direct campaign contributions as well as pay for issue advertising. The Chamber played a major role in the 2000 state judicial races, particularly in Ohio and Mississippi, and has claimed that 12 of its 15 endorsed candidates nationwide were elected.[14]

C. Select Battlefield States.

Three examples of how interest groups have worked to influence the state courts and their decision-making are collected below. *Amici* believe this information is representative of the situation which exists in other states.

Idaho.[15] For many years, judicial selection in Idaho was largely divorced from politics. By custom, the governor appointed many justices after incumbents stepped down. Prior to the 2000 race, no incumbent had been

[14] *See* Deborah Goldberg & Mark Kozlowski, "Constitutional Issues in Disclosure of Interest Group Activities," at 3 n.7, paper prepared for Symposium on Judicial Campaign Conduct and the First Amendment (Chicago, November 9-10, 2001).

[15] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 238-54.

voted out of office for over fifty years and, therefore, justices faced little real prospect of retribution at the polls for unpopular decisions.

All of that changed, however, with the 2000 race. The primary (but not the only) issue in the campaign was a controversial court ruling, decided by a three to two vote, upholding a claim by the United States to federal "reserved" waters rights in several protected areas on federal public lands in the state. *See In re SRBA*, 1999 WL 778375 (Id. 1999). Justice Cathy Silak, who was up for reelection the following year, was the author of the majority opinion.

An October 14, 1999, editorial in *The Idaho Statesman* set the tone for the election. "Through the hand-wringing over Idaho's water rights," the editorial began, "there is one quick-fix solution available to voters: elect a new Supreme Court Justice." The editorial pointed out that Justice Silak's pending reelection "leaves an opening for anybody who thinks she was in error." "Silak should be aware," the editorial concluded, "that there isn't a single Idaho politician in the last 30-plus years – Democrat or Republican – who would dare to run on the platform to allow the federal government to control every drop of water in designated areas of the state."

A steady torrent of criticism subsequently rained down on Justice Silak. A board member of an irrigation district in southern Idaho said, "this is setting a prec dent that is untenable. We can't live with it. No citizen in the Snake River Plain can live with this decision." A representative of the Farm Bureau Federation said the organization was "astounded with this ruling."

Judge Dan Eismann launched his campaign to unseat Justice Silak by appearing and speaking at a party fundraising banquet. Newspaper accounts of the event indicate that Eismann did not explicitly discuss the water rights case, but it was an implicit focus of the event. At a meeting prior to the banquet, a party official called for Silak's removal, stating: "We anticipate having an opponent for her so you will have a choice . . . In this instance you better get out there and vote or you'll be pretty dry."

In the last few weeks before the election, a South Carolina-based group financed an illegal "push poll" designed to sway voters against Justice Silak based on her opinion in the Snake River case. A push poll, conducted under the guise of "polling" voters, is actually designed to "push" them in favor of a particular candidate. The script of the push poll was as follows:

> "Hello, Mr. XX? This is XXX calling. I'm conducting a brief survey. Can I ask you one question? Do you support the move by the courts to transfer control over Idaho water rights to the federal government?
>
> Residents who answered 'no' were told: 'Your opposition to the federal power grab of Idaho water is important. You see, at the May 23 election, Idaho voters will be deciding who will serve on the state supreme court. The current judge, Cathy Silak, is the person most responsible for handing over Idaho water to the federal agents. Her opponent is Dan Eismann. Judge Eismann opposes this giveaway. He is a solid defender of individual freedom and has a record of being fair and honest.'

> The caller was then asked: 'Can we count on you to go to the polls on Tuesday May 23rd and vote for Dan Eismann for state Supreme Court?' "

Who or what was behind this push poll is a mystery. The poll was nominally sponsored by an organization called Citizens for Term Limits Idaho Campaign. The actual telephoning was conducted by a Pennsylvania-based telemarketing firm. According to a press statement by the leader of the Idaho group, the poll was funded by a $50,000 check from Lyle Coggan of the Democracy Fund in South Carolina. Further details on the nature of the fund or the identity of Mr. Coggan, or the basis for their interest in the Idaho race, have never been publicly disclosed.

On May 23, 2000, Justice Eismann won the Supreme Court seat by defeating Justice Silak in the two-person primary by a margin of 60 to 40.

On October 27, 2000, following Silak's defeat at the polls (but before her term expired), the Court, in response to an application for rehearing of its ruling in the Snake River case, reversed itself. *See Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000). This time, again by a three to two vote, the Supreme Court concluded that the United States had not established a reserved water right. Chief Justice Trout, who was scheduled to face the voters two years later, in November 2002, switched her vote.

In a recent address,[16] Justice Christine Durham of the Utah Supreme Court stated that she would be "extremely loath" to conclude that either the public criticisms of Justice Silak or the outcome of the election accounted for the change in the law. But, she said: "The point . . . is this: significant publicity and special interest involvement created an inference that the court's work (and its vote on rehearing) was influenced by a judicial election campaign in which the outcome of this case was a major factor."

Louisiana.[17] In Louisiana, the business community has waged an aggressive and quite successful campaign to produce a more "business friendly" state supreme court. Given the importance of petrochemical and related manufacturing in Louisiana, it is hardly surprising that this campaign was driven in significant part by the business community's objections to environmental regulation.

The leader of the campaign is the Louisiana Alliance of Business and Industry ("LABI"). LABI reportedly has played a role in recruiting candidates for the Court and contributed heavily to its favored candidates. During the 1998 race, Chief Justice Calogero charged that his challenger, Judge Cusimano, was "a handpicked candidate of the Louisiana Association of Business and Industry, trying to change the complexion of the Supreme Court." Cusimano received $26,000 from LABI-affiliated PAC's, close to the maximum allowed, and Cusimano described

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[16] Christine Durham, "The Judicial Branch in State Government: Parables of Law, Politics, and Power," 76 N.Y.U.L.Rev. 1601 (2001).

[17] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 254-69.

himself as a candidate who would bring "a philosophy that understands business" to the Court. LABI prepared at least one judicial evaluation report, in 1998, after the Oklahoma group prepared the initial evaluation report for Louisiana in the 1996 election cycle.

LABI has expressed a clear preference for a merit selection process for state judges but also has been frank about its unwillingness to forego efforts to influence the outcome of the current election process. In the early 1980s, LABI supported legislation to establish a judicial appointment process. Following the failure of the reform legislation, LABI joined the judicial electoral fray. In 1994, the LABI president acknowledged that it was seeking to use its financial power and political clout to influence the Court, stating, "We don't choose to make our judicial system in this state above influence." LABI has contended, "If the Legislature continues to resist some form of merit selection for judges, which is the obvious reform that is needed to insulate judges from the unavoidable influence of special interests, the business community must remain actively involved in the judicial election process."

LABI believes that its activities have "improved" the Supreme Court from a business standpoint. For example, LABI's political director told a reporter that certain recent Supreme Court pro-business rulings "wouldn't have happened as they did" in the absence of LABI's efforts on behalf of certain judicial candidates. At least one celebrated case, the Louisiana Supreme Court's 1997 decision in *Meredith v. Ieyoub*, 700 So.2d 478 (La. 1997), appears to confirm the accuracy of this boast.

The case arose from the decision by the Attorney General to enter into contingent-fee contracts with private firms to assist the State in prosecuting environmental damage claims against polluters. The Attorney General's apparent motivation in entering into these contracts was to enlist the resources and expertise of private law firms in helping the State to enforce the environmental laws. The state association of oil and gas producers and some of its members, who were among the potential targets of litigation under this arrangement, brought suit claiming that the Attorney General lacked the legal authority to enter into this type of contract.

There is strong evidence that the plaintiffs' ultimate success in this litigation is attributable to the business community's successful efforts to elect more "pro-business" justices to the Supreme Court. While the case was pending in the lower courts, LABI and other business groups succeeded in electing two "business friendly" justices to the Court. In its decision handed down in September 1997, the Court ruled, by a 4 to 3 vote, that the contracts were illegal. Justice Victory, who was elected in 1994, with business backing, wrote the majority opinion, which was joined by three other justices, including the two other business friendly justices elected in 1996. The Chief Justice and two other relatively long-time members of the Court dissented. While it is impossible to know how the case would have turned out otherwise, it is reasonable to infer that the outcome in *Meredith v. Ieyoub* was determined by effective political advocacy.

In recent years, Louisiana judicial elections have reached extraordinary heights of partisan viciousness. The 1998 campaign was described in the press as "nasty,

expensive" and "without respite" and full of "biting television ads and a sea of glossy campaign posters." Independent candidate Bill Quigley suggested that his opponents' resources would be better spent in buying television time for a public discussion of the issues rather than in purchasing ads which "demean" the office and make the campaign "like the Jerry Springer show." Not surprisingly, a 1998 survey conducted by the University of New Orleans found that 80 percent of state residents surveyed thought the Louisiana Supreme Court was too influenced by politics.

Ohio.[18] The unsuccessful effort to unseat Justice Alice Resnick from the Ohio Supreme Court in November 2000 illustrates the extraordinary size of third-party investments in efforts to influence state judicial elections.

For nearly a decade, the Ohio Chamber of Commerce and other groups have waged a concerted campaign to alter the ideological balance on the sharply divided Ohio Supreme Court. The Ohio Chamber of Commerce actually published the first judicial evaluation report, in the mid-1990's, apparently providing the model for the Oklahoma group's subsequent nationwide organizing effort discussed above.

In the November 2000 race, the campaign focused on an effort to oust long-term incumbent Justice Resnick. The Chamber's judicial evaluation report assigned Resnick the lowest "pro-business" score of any justice on

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[18] Unless otherwise noted, this material is drawn from John D. Echeverria, *supra* note 3, at 287-300.

the court, and also assigned her the lowest pro-business voting record in environmental cases specifically.

The Chamber rhetoric leading up to the campaign suggests the importance of the effort to unseat Resnick to business interests. The Chamber's 2000 judicial evaluation report stated that "[b]usiness leaders need to realize that as Ohio enters the 21st century, the anti-business tilt of the Ohio Supreme Court presents one of the biggest challenges to the state's business climate. . . . The state's legal climate has become a negative factor for businesses considering new or expanded operations in Ohio."

Citizens for a Strong Ohio, an arm of the Ohio Chamber of Commerce, and the U.S. Chamber of Commerce's Institute for Legal Reform, spent a reported $5 million in advertising attacking Justice Resnick, but refused to disclose the identity of their contributors. The harshest anti-Resnick ad featured a statute of lady justice peeking under her blindfold at bundles of money, with an announcer intoning that Justice Resnick had received $750,000 in campaign contributions from the trial lawyers since 1994 – and voted in their favor 70% of the time. The ad concluded by asking: "Is justice for sale in Ohio?" The backers of this expensive advertising campaign evidently thought the answer to their question was clearly "yes."

II. The Highly Politicized Nature of State Judicial Elections Undermines the Possible Effectiveness of Rules Limiting Speech and Other Political Activity of Judicial Candidates.

While *amici* take no position on the First Amendment issues in this case, the evidence discussed above concerning politicization of the state courts may nonetheless be relevant to the Court's resolution of these issues. Restrictions on speech and other political activity are permissible only if they serve a "compelling" government purpose. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 228-29 (1989). Furthermore, the restrictions must be "narrowly tailored" to use the "least restrictive means" to achieve the stated goal. *Burson v. Freeman*, 504 U.S. 191, 198 (1992). While protecting the independence and impartiality of the judiciary is unquestionably a compelling purpose, it is questionable whether Canon 5 can meet the stringent standards of the First Amendment.

First, starting at the most basic level, the restrictions arguably cannot serve to protect judicial independence and impartiality because they cannot alter the basic nature of the electoral process itself. The very purpose of popular elections is to ensure that elected officials will be responsive to the citizenry. Political responsiveness is the antithesis of independence. In other words, in a fundamental sense, an independent and impartial elected court is an oxymoron, and efforts to limit the speech and other political activity of judicial candidates cannot alter that conclusion.

To be sure, no judge, regardless of the method of his or her selection, is completely free of any chimera of political or ideological taint. A litigant can often evaluate from a judge's past professional activities, volunteer work, legal writings, and so on whether a judge is likely to be sympathetic to a particular legal position. Even under a merit-appointment system, it would be naive to suppose that elected officials who select and review nominees are not influenced by a candidate's judicial philosophy and their general sense of how a candidate will approach certain legal issues. The judicial branch cannot be divorced from the political process.

But, within this basic constraint, it makes all the difference in the world whether a judge must periodically run for election – and, perhaps most importantly, run for reelection – in order to serve. Every judicial election places at risk for a judge both the prestige and salary associated with judicial office. As a matter of common sense, judicial rulings likely to offend a significant portion of the electorate, or some well-heeled special interest, will place a judge's job at greater risk. Judicial opinions which are popular and inoffensive to powerful special interests will help enhance job security. It would contradict everything we know and expect of the electoral process to think that elected judges could entirely ignore such considerations.

Second, Canon 5 and similar restrictions are likely ineffective because, even if the political aspects of state judicial elections might be controllable in theory, the reality is that judicial elections are intensely political contests in all if not most states which hold such elections. Special

interests now make large contributions to judicial campaigns and help finance "independent expenditure" activity. The involvement of independent groups in the electoral process is particularly significant because, under governing constitutional standards, mandatory limits cannot be imposed on spending by such groups, *see Buckley v. Valeo*, 424 U.S. 1, 35-39 (1976) (per curiam), and, depending upon the nature of the groups' advocacy, it may be impossible even to require public disclosure of their financial contributors. *See id.* at 79-80. As discussed in section I, prominent players in judicial electoral politics have publicly announced that the purpose of their political advocacy is to change the law. There also is evidence that in some cases special interests have succeeded in these efforts, either by directly changing the ideological complexion of a court's membership or by implicitly threatening sitting judges with retribution at the polls if they rule the "wrong" way. The results of public surveys indicate that the public understands what common sense suggests: the goal of independent and impartial courts has already been severely compromised in some states.

The record in this case appears to indicate that in Minnesota in particular, as in other states, special interest involvement in judicial elections already has seriously eroded the independence and impartiality of the courts. A variety of "quasi-political organizations" are involved in Minnesota judicial politics, including state and local bar associations, the League of Women Voters, "People for Responsible Government," Minnesota Women Lawyers, Lavender Magazine, and Minnesota Family Council. *See Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 901

(8th Cir. 2001) (Beam, J., dissenting). As stated by Judge Beam, "such groups can easily bring pressure to bear in judicial elections." *Ibid.*

Finally, even it could be concluded that Canon 5 and similar restrictions help serve to protect judicial independence and impartiality, in Minnesota and/or in other states, it is also debatable whether such restrictions represent the "least restrictive means" for achieving the state's objective, as required by the First Amendment. The State of Minnesota could eliminate judicial elections and select judges through a "merit appointment" process instead. A number of states have adopted this approach, and it has proven to be a stable and workable method for judicial selection. The federal government has, of course, avoided the need for considering similar restrictions of judges' speech, because Article III judges are appointed by the President subject to the concurrence of the U.S. Senate.[19]

Merit appointment, by removing the judiciary from politics to the maximum extent possible, would protect the independence and impartiality of the Minnesota courts far more effectively and comprehensively than

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[19] While the strict "compelling government purpose" and "least restrictive means" tests apply to direct restrictions on speech, the same tests do not necessarily apply to all types of legal controls on the state judicial electoral process. *Cf. Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976) (discussing the relatively more deferential standard applied to limits on campaign contributions, as compared to campaign expenditures). In particular, *amici* do not believe that the availability of the merit-selection option necessarily bars limits on contributions to judicial candidates or third-party entities, or precludes strict public reporting of contributions and expenditures.

Canon 5. At the same time, removing the judicial selection process from the electoral process would eliminate the need to seek to restrict First Amendment freedoms. In general, Minnesota and other states have broad latitude in designing their own forms of government. However, at least for the purpose of evaluating this First Amendment claim, it is certainly relevant that there is a widely accepted and well-tested alternative method of judicial selection which promotes judicial independence and impartiality without the need to restrict speech under the First Amendment.

III. State Judicial Election Procedures Violate Litigants' Rights Under the Due Process Clause to Have Their Cases Heard by Fair and Impartial Courts.

Amici submit that the fundamental issue raised by the politicization of the state court systems is whether litigants are being denied their rights to fair and impartial courts under the Due Process Clause of the Fourteenth Amendment. If so, then the entire system of judicial administration in some states may be subject to constitutional challenge under the Due Process Clause. *But cf. Public Citizen, Inc. v. Bomer*, 115 F.Supp.2d 743 (W.D.Tex. 2000), *aff'd on other grounds in an unreported decision*, ___ F.3d ___ (5th Cir. 2001) (dismissing on jurisdictional grounds broad constitutional challenge to Texas system for electing state judges). At a minimum, the current situation creates the prospect of legal challenges to specific court decisions on the grounds that the state courts have not supplied the reality, or at least the appearance, of impartial justice.

"The Due Process Clause entitles a person an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jericho*, 446 U.S. 238, 242 (1980). This "jealously guarded" protection is designed both to avoid "unjustified or mistaken deprivations," *id.*, as well as to "preserve the appearance and the reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.' " *Id.*, quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J.). The Court, in a recent articulation of the applicable test, stated that, "[b]efore one may be deprived of a protected interest . . . , one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him to not to hold the balance nice, clear, and true." *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (internal citations omitted). The Court has repeatedly applied this rule to bar the participation of judges in cases in which the court's impartiality could reasonably be questioned. *See, e.g., Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

The Court has frequently emphasized that the Due Process Clause is offended, not only by the reality but also by the appearance of impartiality. "Indeed, justice must satisfy the appearance of justice, and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall*, 446 U.S. at 242. *See also Aetna*, 475 U.S. at 825 ("mak[ing] clear that we are not required to decide

whether in fact [the judge] was influenced, but only whether sitting on the case . . . would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear, and true").

The current, increasingly politicized system of judicial selection raises a host of due process concerns. Large campaign contributions by lawyers and private firms and individuals, as well as "independent" expenditures designed to support a particular candidate, raise obvious and serious questions about whether a judge will feel beholden to supporters whose interests may be affected by a pending case. In addition, a judge presiding over a case involving past campaign contributors might feel pressure to rule in a fashion that maximizes the chances of receiving contributions for the next election cycle. On the other hand, as the example of the Idaho Supreme Court arguably illustrates, a judge might be influenced by a desire to avoid being targeted by a specific constituency which might object to some ruling. As discussed, the constitutional test turns not only on the reality of improper influence but on the "appearance" of impropriety. As stated by Justice Kennedy, the increasing "scramble" to finance state judicial elections raises the concern "that there will be either the perception, or the reality, that judicial independence is undermined."[20]

Amici recognize that removing restrictions on judicial candidates' speech and political activities could make existing, already serious due process problems even more

[20] Frontline, Justice for Sale (PBS television broadcast, November 23, 1999).

serious. Once an elected judge or candidate has committed to a particular public position on a legal issue, he or she may feel an obligation to stick to that position, undermining a litigant's right to an impartial hearing. On the other hand, if a judge departed from a previously stated position, he or she might be called to account by the voters. Just as the electorate has punished elected officials who failed to fulfill pledges of "no new taxes," the electorate might toss from office judges perceived as having broken pledges to "punish criminals," or "protect human life," and so on.[21] The dilemma of attempting to navigate between First Amendment concerns and due process problems can be resolved most directly through adoption of merit selection procedures.

The Court has not specifically addressed the point at which campaign contributions and other political activities in state judicial elections so undermine the fair administration of justice that they rise to the level of a due process violation. To date, lower federal and state courts have been reluctant to entertain such challenges. *See, e.g., Shepherdson v. Nigro*, 5 F.Supp.2d 305 (E.D. Penn., 1988) (rejecting due process challenge to state court dismissal of plaintiff's claim when court received over $20,000 in campaign contributions from the defendant's

[21] On the other hand, it could be contended that eliminating Canon 5 and similar restrictions might help protect the independence, if not necessarily the impartiality, of the courts and thereby help serve due process values. If judges and judicial candidates could speak more freely, they could at least speak out to counter misleading or unfair criticisms of their views.

law firm). The reasons offered for not entertaining such claims are not convincing.

First, it has been suggested that because "it is the public which supports, or tolerates the election of state judges . . . , [i]t is unrealistic and unfair to require that judges run for election and then deride them for accepting the money that is necessary to sustain a campaign from a principal source." *Id.* at 310. State judges cannot, of course, be faulted for operating within the constraints imposed by a state's judicial selection process. In the context of a due process case, however, the issue is whether the litigant has been deprived of his or her constitutional right to an impartial tribunal. That state judges deserve no individual blame for the constitutional infirmities of the state court systems is not a valid reason for ignoring such infirmities.

Second, it has been suggested that requiring judges to routinely recuse themselves in cases involving lawyers or litigants who contributed to their campaigns would require judges to recuse themselves in many if not most of their cases. *See, e.g., Roe v. Mobile County Appointment Board*, 676 So.2d 1206, 1233 (Ala. 1995). It is debatable whether a modest campaign contribution, in the absence of any other consideration, should be sufficient to support a finding of a due process violation. On the other hand, it is certainly true that judicial recognition that campaign contributions implicate due process concerns may cast a constitutional shadow upon many state court systems. The magnitude of the due process problems created by state judicial elections is hardly a legitimate argument for sweeping the due process concerns under the rug.

Finally, it has been suggested that "constitutionalizing" state judicial selection procedures would require federal courts "to engage in the type of policy making more appropriately undertaken by pertinent state authorities," and, therefore, the federal courts should defer to "the state authorities responsible for adopting and interpreting codes of judicial conduct or the highest courts in the states." *Shepherdson*, 5 F.Supp.2d at 10-11. The short answer to this argument is that the state courts are not exempt from the requirements of the Fourteenth Amendment. In the past, the Court has not hesitated to declare that specific state court decisions, *see, e.g., Aetna Life Insurance Co. v. Lavoie, supra,* or even that widespread judicial institutional arrangements, *see, e.g., Ward v. Village of Monroeville*, 409 U.S. 57; *id.* at 62 (Rehnquist, J., dissenting), violate the Due Process Clause.

In the absence of appropriate supervision by this Court of state judicial elections under the Due Process Clause, the dismal future of the state courts is easy to foretell. The major interest groups already invested in these electoral contests will be joined by numerous other groups. Judges seeking reelection will be routinely rated by abortion rights and anti-abortion groups, consumer advocates, environmentalists, libertarians, and so on. Just as no self-respecting lobby organization can afford not to be represented at the state legislature, no significant interest group will be able or willing to sit out state judicial elections.

Over time, the nature of many state judiciaries will be utterly transformed. Rather than being essentially judicial bodies, the state courts will take on the characteristics of a legislative forum. The composition of the

elected state courts, as well as their decisions, will reflect the same balance of competing political forces reflected in the voters' choice for governor and state legislature. When litigants lose important, controversial cases, they will properly surmise it was because their side of the argument lost at the ballot box, not because an impartial evaluation of the facts or the law dictated any particular outcome. The ideal of the courts as protectors of the unpopular and the powerless within our society will be lost, and the fair administration of justice and the protection of liberty will be destroyed.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to decide this case in light of the broader problem of the politicization of the state court systems, including the serious questions about whether litigants are being denied their due process rights to fair and impartial courts.

Respectfully submitted,

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January 17, 2002

APPENDIX

Idaho Conservation League ("ICL") is an Idaho non-profit membership conservation organization. ICL and its approximately 2,800 members are dedicated to protecting and conserving Idaho's natural resources, including its wildlife resources. ICL's mission is to "protect and restore the clean water, wildlands, and wildlife of Idaho." ICL has worked to protect water resources in Idaho, including by attempting to intervene in the Snake River Basin Adjudication proceeding over federal reserved water rights in wilderness areas which was the focus of the electoral contest leading to the defeat of Justice Silak. ICL also has participated as an intervenor in other aspects of the Snake River Basin Adjudication proceeding.

The Louisiana Environmental Action Network (LEAN) is a statewide coalition of grassroots and community organizations dedicated to making Louisiana's communities safer, healthier places to live. Major LEAN projects focus on controlling water pollution, reducing toxic air emissions, and improving the safety of pesticides. LEAN has closely monitored political efforts to influence the Louisiana Supreme Court on environmental and other issues.

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In the Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

VERNA KELLY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF MINNESOTA STATE REPRESENTATIVE PHILIP KRINKIE AND EIGHTEEN OTHER SIMILARLY SITUATED STATE LEGISLATORS* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Minnesota State Representative Phil Krinkie, Minnesota State Representative Greg Blaine, Minnesota State Representative Mark Buesgens, Minnesota State Senator Stephen Dille, Minnesota State Representative Rob Eastlund, Minnesota State Representative Sondra Erickson, Minnesota State Representative Chris Gerlach, Minnesota State Representative Tony Kielkucki, Minnesota State Representative Arlon Lindner, Minnesota State Representative Richard Mulder, Minnesota State Representative Bud Nornes, Minnesota State Representative Mark Olson, Minnesota State Representative Mike Osskopp, Minnesota State Senator Kenric Scheevel, Minnesota State Senator Grace Schwab, Minnesota State Senator Dan Stevens, Minnesota State Representative Kathy Tingelstad, Minnesota State Representative Torrey Westrom, and Minnesota State Representative Thomas Workman (collectively, "Legislators") hereby respectfully submit this brief as *amici curiae* in support of Petitioners in accordance with Supreme Court Rule 37.3. All parties have consented to this filing, and their written consents have been filed with the Court.[1]

INTEREST OF THE AMICI CURIAE

As members of the Minnesota State Legislature (15 from the Minnesota House of Representatives and 4 from the Minnesota Senate), Legislators come before this honorable Court to present their view, from the legislative branch of our State, of the paramount importance of free and open judicial elections to Minnesota's system of state government. Indeed, because Minnesota's constitutional requirement for judicial elections differs so radically from the federal constitutional provision for appointment and life tenure for judges, Legislators' perspective may be of particular assistance to this

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no one other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Court. Although Minnesota's constitutional mechanism for selecting judges may be different from the Federal model, it is no less worthy of respect by the federal courts, including a keen attentiveness to the fundamentally different public policy interests presented by an electoral process versus an appointment process.

In the view of the *amici*, an election can only be legitimate if the People – who in their sovereign capacity ordained and established our state Constitution – are given meaningful and unfettered access to the views of all candidates for election. Indeed, *amici* submit that the right of the People to vote necessarily includes the right of the People to vote wisely and with full access to the views of the candidates, *especially* their views concerning disputed legal and political issues. Each of the *amici* can attest from his or her own experience as elected legislators that the free flow of ideas is imperative during an election contest. *Amici* have a strong interest in ensuring that all branches of Minnesota's state government remain equally accountable to the People through the constitutionally-mandated electoral process. In recognition of their sworn duty to support and defend the constitution and laws of the United States and of the State of Minnesota, and in recognition of the importance of the question presented in this case to our State, *amici* offer their support for Petitioners' position.

SUMMARY OF ARGUMENT

The Minnesota Constitution expressly provides for the direct election of judges by the People. The framers of our State constitution were well aware that the electoral process for judges would present political issues. But our constitutional framers and our People embraced both the advantages and disadvantages of their decision in order to advance what they deemed to be the greater good: namely, that judges should be directly accountable to the People they govern.

The State has no compelling interest in limiting the First Amendment rights of judicial candidates. To the contrary, the State has every interest in protecting the public's constitutional right to elect judges, and to ensure that votes for judicial candidates are cast with knowledge and not in ignorance. Even more important than the candidates' right to speak is the *public's right to hear* the speech in evaluating judicial candidates. The People can and must be trusted to choose wisely, and to determine for themselves the importance of "impartiality" in the greater scheme of electing a quality judiciary. The People have reserved this right to themselves, and they have not consented to any other manner for the selection of judges.

The restrictions imposed by Canon 5 are a direct assault upon the prerogative of the Legislature to make laws, including laws concerning the conduct of elections. In its drive to insulate incumbent judges from political pressures, under the guise of an exercise of its inherent judicial power, the judiciary upsets our constitutional system of checks and balances, and unfairly favors incumbents over challengers. This absence of viewpoint neutrality is fatal under First Amendment scrutiny.

The regulation of judicial elections in the form of Canon 5 is a restriction adopted by the Respondents to regulate elections for *political* offices. The judiciary's purported self-regulation in this instance restricting free speech in judicial contests is a conflict of interest – self-servingly harboring incumbent judges from the rigors of political campaigns. But the restriction is even more insidious as an invasion of the public's sovereign right to hold accountable the judges they elect to govern them. The public's right of scrutiny and review of judges does not operate as a limitation upon Respondents' responsibilities of oversight and management of judges. Rather, judicial elections function as an additional, but separate, manner of direct review by the People.

ARGUMENT

I. THE PEOPLE OF MINNESOTA HAVE MANDATED THE ELECTION OF JUDGES TO ENSURE THAT THEIR JUDGES SHALL BE DIRECTLY ACCOUNTABLE TO THEM.

A. The People Of Minnesota Chose Direct Election Of Judges With Full Knowledge That Those Elections, Like All Others, Would Present Political Issues.

Article VI, Section 7 of the Constitution of the State of Minnesota (1974) provides as follows (emphasis added):

> "The term of office of all judges shall be six years and until their successors are qualified. They shall be *elected by the voters* from the area which they are to serve *in the manner provided by law.*"

From Minnesota's admission into the Union in 1858, its state constitution has always provided for the direct election of all judges by the People of Minnesota. The debates of the twin Constitutional Conventions confirm that the constitutional provision for direct election of judges was a deliberate departure from the Federal model, and that it was made with full knowledge that an electoral process would subject judges to political considerations.

The Republican Constitutional Convention embraced direct election of judges with very little debate. It is clear from these proceedings, however, that the Convention delegates were well aware that political and partisan issues might intrude into judicial election campaigns, but this knowledge did not dissuade them from requiring election of judges. In fact, the Convention defeated a modest amendment offered by Thos. Galbraith that merely would have provided for the election of judges on a different day from that for the election of legislators and other

constitutional officers. The stated rationale for Mr. Galbraith's amendment was "that the excitement of mere political and party issues should be kept as far as possible from the election of judges." Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota (August 8, 1857), 406 (T. Andrews reporter 1858) (hereinafter, "Republican Convention Debates"). But delegate Charles Lowe did not agree that the amendment would be "beneficial" or that it would "be possible to separate the election of judges from political considerations. . . ." *Id.* The amendment was quickly defeated. *Id.* at 407.

Moreover, the delegates were well aware that party politics might well play a role in judicial decision making. In the context of a debate concerning whether the franchise should be limited to white men only and concerning this Court's infamous decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), Republican delegate Chas. McClure predicted that Democratic judges would feel themselves bound by the *Dred Scott* decision "because it would be carrying out the views of their party," but that Republicans might take a different view. Republican Convention Debates at 378 (August 7, 1857).

The Democratic Constitutional Convention was somewhat more contentious, but the result was the same. Initially, the report of the Committee on the Judiciary for the Democratic Convention in 1857 proposed a compromise between factions favoring appointment of judges and election of judges. The compromise position called for the direct election of inferior judges and nomination of Supreme Court judges by the Governor. But the Convention cast aside this compromise and adopted an amendment offered by delegate Lafayette Emmett requiring the direct election of supreme court judges as well. *See* Debates and Proceedings of the Minnesota Constitutional Convention (August 14, 1957), 493-509 (F. Smith reporter, 1857) (hereinafter, "Democratic Convention Debates").

In offering his amendment, Mr. Emmett – who was then the Attorney General of the Minnesota Territory[2] – explained (Democratic Convention Debates at 494):

> "I think that the great principle of an elective Judiciary will meet the hearty concurrence of the people of this State, and that it will be entirely unsafe to go before any people in this enlightened age with a Constitution which denies to them the right to elect all the officers by whom they are to be governed."

Mr. Charles E. Flandrau supported the amendment, among others, stressing the lofty Democratic ideal of "the people being able to govern themselves." *Id.* at 495.

Typical of those opposed to the election of judges were the remarks of delegate B. B. Meeker, who bemoaned the fact that if judges "are to be elected, [they] must necessarily be essentially political Judges; they cannot be anything else." Unrelenting in his campaign for a supposedly independent Judiciary, Mr. Meeker offered an amendment of his own, after Mr. Emmett's amendment was agreed to, that would have lengthened the term of supreme court judges to 10 years and would have made them ineligible for reelection, "so that they shall never be influenced by any motives concerning their reelection by the people." *Id.* at 509. But that amendment was defeated. *Id.* at 511.

The views of Mr. Emmett and the majority prevailed at the Constitutional Convention, and the direct election of all judges was agreed to. The cry of the now familiar opposition for an "independent judiciary" – apparently meaning an appointed rather than an elected judiciary – was overcome by these prescient remarks by Mr. Emmett (*id.* at 503):

> "We hear a great deal of talk about an independent Judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people?... I say that in order to correct the errors of Judges – and it may be important to correct them, – the office should be made elective."

[2] W. Foster & M. Anderson, eds., *For The Record, 150 Years of Law & Lawyers in Minnesota*, 321 (Minn. State Bar Assn. 1999).

One year later, Lafayette Emmett became our State's first chief justice. *For the Record*, 321.

For the Constitutional Convention, the question of direct election of judges was fundamentally a question of trust. Could the people be trusted to elect their judges directly, to sift and determine issues of judicial competence and impartiality (among others) for themselves? Our constitutional framers said yes. Mr. Emmett expressed Minnesota's abiding trust in its People to determine their own course with these words: "if the people are incapable of selecting their Judges, they are also incapable of selecting the man who is to appoint the Judges." Democratic Convention Debates at 503.

B. Minnesota's History Of Judicial Elections Demonstrates That Judicial Offices Were Designed To Be Political Offices.

The constitutional requirement of election of judges has never been repealed, but rather has been amended to increase – not decrease – the accountability of Minnesota's judges. In this regard, the term of supreme court judges initially was seven years, but the Constitution later was amended to provide for a six-year term. Moreover, the length of time between an appointment to fill a judicial vacancy and subsequent election of a successor was increased from 30 days to one year in order to give sufficient time "to allow the public to reflect favorably or unfavorably on a judge's competence in office," while still "retaining ultimate control of the judiciary in the hands of the voting public." *Peterson v. Stafford*, 490 N.W.2d 418, 423 (Minn. 1992) (citing

Judicial Branch Committee Report, Minnesota Constitutional Study Commission (1972)).[3]

The "nonpartisan" designation for judicial elections referred to by the Court of Appeals below (247 F.3d at 857) was not a *constitutional* change regarding judicial elections. Rather, the "nonpartisan" designation was part of a broader legislative initiative to make virtually all political offices "nonpartisan" - - because of the political pressures of Prohibition:

> Party designation was dropped in 1913 largely as the result of a parliamentary struggle between the "drys" and the "wets" in which the opponents of prohibition working with liquor interests exploited sentiments within the legislature that were strongly critical of party machines and boss control. One must remember that this was the era of progressivism, when parties were disdained and political independence was extolled, and when it was hoped that direct political action by the people (through means such as initiative, referendum, recall, and direct primary) would lead to more responsible government.

G. Theodore Mitan, *Politics in Minnesota* 57 (Univ. of Minn. Press 1960).

Because of this pendulum in politics, all city, county, legislative and judicial offices in Minnesota were designated non-partisan, by legislative enactment. In 1913, the state legislature enacted a statute providing (1913 Minn. Laws ch. 389, § 182) that:

[3] *See also* Report of the Constitutional Commission of Minnesota, 45 (1948) (recommending increase in time between appointment and appointee's subsequent candidacy to "give sufficient time to enable observation of the competence developed by the appointee prior to the election").

> ". . . the names of all candidates for nomination for the office of chief justice, associate justice of the supreme court, judges of the district court, probate and municipal courts and all members of the state legislature, and all elective county officers, and all municipal offices in cities of the first and second class, shall be placed upon a separate primary ballot hereinafter designated as "non-partisan primary ballot.
>
> * * * *
>
> The two candidates for nomination for every such non-partisan office who shall receive the highest number of votes, ascertained as provided by this act, shall be declared the nominees and their names shall be placed upon the election ballot, without party designation. . . ."

All city, county, legislative, and judicial offices remained non-partisan in Minnesota until 1973, when the legislature amended this section only by striking six words, "all members of the state legislature," from the renumbered section. See 1973 Minn. Laws ch. 3 § 202.03. The non-partisan designation was repealed as to legislators in 1973, but still applies to county commissioners and other local office holders, as well as to our judges.

For sixty years, most political offices in Minnesota were nonpartisan. Yet, it is impossible to believe that all of the candidates for these offices over these many years refrained from discussing the issues and controversies of their day. Nor is it possible to believe that the state ever had a legitimate interest, and even less a compelling interest, in restricting their right to do so. No one would even think of arguing that such a designation prohibited free speech by legislative candidates or candidates for county or local elected office. *See Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (1939) (non-partisan statute directed merely at filing procedures and ballot designations). Accordingly, the "nonpartisan" label still applicable to candidates for judicial office and county

and local elective offices cannot be read to support restrictions on the speech of candidates for those offices.

C. The Electoral Process Requires That The People Be Trusted To Make Their Own Decisions Based Upon More Speech, Not Less.

It is not in the State's best interest to restrict the speech of any candidate that is running for elected office. Our State is its People, not the current members of the Minnesota bench, or the Minnesota State Bar Association ("MSBA"). Our Supreme Court is an institution to be honored when it acts honorably, and the lawyers in our state are worthy of respect when they concern themselves with finding the truth and serving the interests of justice. However, neither our Supreme Court, nor the MSBA may legitimately claim exclusive authority to articulate the best interests of the State of Minnesota.

To the contrary, in our democracy the People have a vested interest in obtaining as much information as possible in order to cast an informed vote, including all of the information that candidates believe important for an evaluation of their candidacy. Indeed, this Court repeatedly has observed that:

> "there is practically universal agreement that a major purpose of that [First] Amendment was to protect the free discussion of governmental affairs . . . [and] it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Brown v. Hartlage, 456 U.S. 45, 52-53 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966) and *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-272 (1971)).

That Minnesota's elected judges hold *political* office is by constitutional design. Many of our State's first judicial

races were partisan, with political party nominations. *See For the Record*, 321-323. In fact, from 1858 to 1913, many of our State's Chief Justices had been nominated by one, and sometimes two, political parties. *Id.* Clearly, our judicial offices were intended by our constitutional framers to be political offices, as evidenced by our early citizens' words, actions, and subsequent conduct. Judicial elections, like any other elections, thus are entitled to the same constitutional guarantee of free speech as enunciated by the Court in *Brown v. Hartlage*.

In its book, *For The Record, supra* at 170, the MSBA presented an overview of our State's district court system, which logically may be expanded to include our state's entire judicial branch:

> There are three major objectives of the district court system: (1) to provide impartial decisions of the highest quality possible; (2) to ensure that justice is timely and uniformly applied; and (3) to encourage respect of the law and the administration of justice.

As Legislators, *amici* agree in theory with this basic assessment of the objectives for our judiciary. But *amici* disagree with the position that is argued by Respondents that the objective of impartiality should be the paramount concern, to the detriment of all other concerns, when it comes to the election of our judges. Legislators also dispute the hidden premise in Respondents' argument that the People cannot be trusted to determine for themselves whether a particular judicial candidate can be impartial, or to weigh this concern against other values. Quality decisions, uniformity of decisions, and respect for the law and justice certainly are of no less consequence than impartiality. Nor can Legislators agree that impartiality should be paramount to federal and state constitutional protections for the rights of free speech.

Amici trust that members of the electorate are wise enough to evaluate the impartiality of judges (given meaningful opportunity to review the decisions and views of

judicial candidates), as well as to evaluate such additional concerns as quality and uniformity of decision, judicial philosophy and judicial temperament. And *amici* trust the People to determine for themselves, based upon all of the information, the weight to be accorded to each of these objectives when casting their ballots. Justice Brandeis once observed "public discussion is a political duty" in our country." *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion). And as this Court affirmed in *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam), Justice Brandeis' observation "applies with special force to candidates for public office."

The framers of our state constitution had the option and example before them of the federal court, where judges are appointed for a life tenure. Minnesota's constitutional framers rejected that option in favor of elections -- so as to ensure direct accountability of judges to the people. That is not to say that Minnesota's way necessarily is better than the federal system, but it is different and it must be respected by this Court without importing *sub silentio* the rationale for the competing system of appointed judges as the paramount virtue.

Nothing short of a constitutional amendment should be required to limit the People's right to meaningfully select their judges. Minnesota's constitution requires judges to be directly accountable to the electorate. Legislators believe that any restriction upon the People's constitutional prerogative to select judges is a violation of the Minnesota state constitution – whether or not the "regulation" has been adopted by the state's Supreme Court, endorsed by the state's bar association, or advocated by any other group now before this Court. "The critical right at stake here is the right of the *public* to hear the candidates messages, not simply the rights of the *candidates* to express themselves." Note, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 Tex. L. Rev. 606 (Feb. 1995). This argument, that the public's right to know is even more critical than the candidates' right to speak, is based upon the rationale

of self-governance, which forms the very basis of our governmental authority (judicial, executive, and legislative). *Id.*

Minnesota's current Supreme Court Chief Justice, held in high regard throughout our State, has made comments that support the case for more meaningful elections. Chief Justice Kathleen Blatz has reported that "[s]urvey after survey confirms that a large segment of the public does not understand or appreciate in a meaningful way the protections the judicial system provides, the role it fulfills, and the contributions it makes to the common good." Chief Justice Kathleen Blatz, "The State of the Judiciary," Address to the Minnesota State Bar Association, June 25, 1998, reprinted in *Bench & Bar*, October 1998, 43, 46. Chief Justice Blatz further remarked that the "level of public trust and confidence is the ultimate measure of our courts' performance and thus these survey results are of serious concern. . . ." *Id.*

As Legislators, *amici* believe that prohibiting candidates from discussing, responding to questions, and offering opinions regarding controversial issues only perpetuates this lack of trust and confidence recognized in the surveys cited by Chief Justice Blatz. It is nothing more than hollow and artful argument to claim that the public's right to participate in elections is secure without the candidates' complimentary right to speak regarding issues and controversies in our courts. On what basis shall an intelligent voter evaluate and select a candidate for public office?

Respondents' position cavalierly dismisses the public's paramount interest in meaningful participation in judicial elections with the unmistakably patronizing premise that the public cannot be trusted to select qualified and quality individuals to serve in the judiciary. Legislators reject that premise. Minnesota has a very concerned and committed electorate. In fact, Minnesota has one of the highest percentages of qualified voter turnout nationwide; the Minnesota Secretary of State's Office reports that in the 2000 general election we had 3,547,000 eligible voters, of which 2,458,303 actually voted – a nearly 70% voter participation

rate. *See* Minnesota Secretary of State Elections Website, Election Statistics and History: www.sos.state.mn.us/election/result.html (Jan. 14, 2002).

The strength of our government lies in the wisdom of its people. By promulgating Canon 5's restrictions upon the speech of candidates for judicial office, Minnesota's judiciary has lost faith in the wisdom of the People to decide among all candidates for themselves. And in attempting to protect the People from themselves, that same judiciary has subtly but perniciously undercut the People's constitutional prerogative to elect their judges. This violence to our State constitutional system of governance cannot support the Court of Appeals' finding that Canon 5 is justified by a compelling "governmental interest in an independent and impartial judiciary." *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 867 (8th Cir.), *cert. granted*, __U.S.__ (2001).

Quite to the contrary, *amici* submit that the People of Minnesota have a compelling state interest in more speech, rather than less, from all of their candidates for elective office, including judicial candidates. This compelling interest is to be found not only in the State constitutional provision for direct election of judges by the People, but also in the state and federal guarantees of free speech. *See* Minn. Const., art. I, § 3; U.S. Const., amends. I, XIV; *accord Brown v. Hartlage*, 456 U.S. at 53 ("[t]he political candidate does not lose the protection of the First Amendment when he declares himself for public office").

D. To The Extent Judges Make Public Policy, They Should Be Subjected To More Scrutiny In An Election, Not Less.

All concede that our judges participate in governing the people. For their participation they are accountable by those governed in their courtrooms. "Judges are active participants in the daily process of governing the American people; therefore the people have a right to know how a judicial candidate plans to conduct him or herself if she is selected to

fill the office." Note, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 Tex. L. Rev. 597, 613 (Feb. 1995).

Accountability to the public is even more critical given the inescapable, although controversial, theory that judges actually make law. "Lawmaking is the inevitable process of an active, powerful judiciary that is exercising its constitutional power." *Id.*, at 611. Minnesota Chief Justice Blatz has describe well the role of judicial activism within the current dynamics of cases in our courtrooms (*Bench & Bar, supra,* at 44):

> "People look to the criminal justice system today to handle issues that individuals, families, communities, and societal institutions used to handle. Children out of control, aging parents whose health situations raise heartrending questions of biomedical ethics, complicated social interactions, and substance abuse which underlies huge percentages of our cases – these were not perceptible issues just a generation ago, but are commonplace in courtrooms throughout Minnesota every day."

Further, in recent years, our Supreme Court has handed down decisions that clearly announce new rights and protections, and articulate new legal and public policy standards. *See, e.g., State v. Tenerelli*, 598 N.W.2d 668 (Minn. 1999) (requiring criminal defendant to pay for shawman ceremony sacrificing chicken and cleansing soul is not religious and does not violate separation of church and state), *reh'g denied*, 1999 Minn. LEXIS 600 (Sept. 2, 1999), *cert. denied*, 528 U.S. 1165 (2000); *State v. Russell*, 477 N.W.2d 886, 888-889 (Minn. 1991) (announcing that Minnesota's equal protection clause is no longer co-equal with federal constitution's equal protection clause, but "different and more stringent"); *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (finding state constitutional right to state-funded abortion).

Our judges routinely resolve social issues and attempt to find rough justice where statutory and legal authority may not exist. By doing so they also establish public policy – conduct which is inherently legislative, and not judicial – and challenge the separation of powers along the way. Yet while our judges purport to represent the public, and make policy decisions on their behalf, they have avoided meaningful scrutiny by the voters regarding their performance.

II. CANON 5 IS AN UNWARRANTED INTRUSION UPON THE PREROGATIVES OF THE LEGISLATIVE BRANCH.

At issue in this case is whether Canon 5 of the Minnesota Code of Judicial Conduct, which is applicable to attorney candidates for judicial office through Rule 8.2(b) of the Minnesota Rules of Professional Conduct, violates the Constitutional right to freedom of speech under U.S. Const. amends. I, XIV.

Under the guise of regulating judicial conduct, Canon 5 unlawfully intrudes upon the constitutional prerogatives of the legislature to enact laws, specifically to make laws concerning the conduct of judicial elections. *See* Minn. Const. art. IV, § 22; Minn. Const. art. VI, § 7. Running for office – even a judicial office – is not a judicial act. It is a political act beyond the power of the judiciary to regulate.

Election contests do not take place in courthouses before judges; they take place in the whole public arena before the whole People of the State. A lawyer candidate for a judicial office is not participating in the administration of justice – which the courts may regulate[4] – but rather is participating in the democratic process itself, which only the People or the Legislature may regulate. Moreover, to the extent that

[4] *See, e.g., In re: Disbarment of Tracy*, 197 Minn. 35, 44 (1936) (finding inherent judicial power to discipline attorneys). The strictures of Canon 5 are made applicable to attorney candidates for judicial office by means of Rule 8.2(b) of the Minnesota Rules of Professional Conduct.

limitations upon the speech of judicial candidates purport to rely upon an exercise of inherent judicial power, such limitations are particularly odious because they would seem to avoid the possibility of any review by the legislative or executive department, thereby overturning the constitutional system of checks and balances. The judicial branch has a clear conflict of interest in promulgating restrictions upon the speech of judicial candidates. Such restrictions not only trample the prerogatives of the Legislature, but also offend sound principles of electoral neutrality that *amici*, as Legislators, strive to defend. The restrictions are *not* neutral as to viewpoint, as the Court of Appeals determined. 247 F.3d at 863. To the contrary, *incumbent* judges are permitted to speak on disputed issues through their opinions; the same opportunity is not available to non-incumbent challengers, however. This imbalance unfairly tends to favor the election of incumbents over their challengers, and fairly raises the question whether Canon 5 is merely a device to favor the retention of incumbent judges. In any event, the absence of viewpoint neutrality is fatal under First Amendment scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-90 (1992) (content discrimination is evidence that "official suppression of ideas is afoot").

As Legislators, we believe that the People are sovereign: "[t]he *only* power the government has is delegated from the people themselves." 73 Tex. L. Rev. at 615 (emphasis added). In Lockean Theory, the legitimacy of the decisions made by our judiciary, like all exercises of governmental authority, rests entirely upon the consent of the governed. *Id.* at 615 (citing J. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under The Lockean Constitution,* 52 U. Pitt. L. Rev. 189, 192 (1990). The sovereign People of our State have mandated that the People will select our judges, and they have never consented to any restriction of this sovereign power.

CONCLUSION

Wherefore the Legislators Amici Curiae pray that the decision of the Court of Appeals upholding the constitutionality of the "announce" clause of Canon 5 be reversed in all respects, and that said clause be invalidated as contrary to the rights secured to the People by the First and Fourteenth Amendments.

Dated: January 17, 2002

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No. 01-521

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IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

KELLY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE PENNSYLVANIANS FOR MODERN COURTS IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICUS CURIAE

Pennsylvanians for Modern Courts ("PMC"), a non-partisan, nonprofit Pennsylvania corporation, is an educational and charitable organization formed with the express purpose of studying the judicial system of the Commonwealth of Pennsylvania and possible reforms and improvements of that system. In furtherance of this mission, PMC has advocated reforms of Pennsylvania's judicial selection system, which is an elective system similar to that of Minnesota. Of particular relevance to this case, PMC appeared as *amicus curiae* before the Third Circuit Court of Appeals in *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137 (3d Cir. 1991), a case that presented substantially the same issues as are presently before the Court.

The "announce clause" of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, which the decision below upheld, is identical to the announce clause of Canon 7(B)(1)(c) of the Pennsylvania Code of Judicial Conduct. PMC files this *amicus curiae* brief in support of affirmance of the decision below out of its concern that if the announce clause is held unconstitutional, public confidence in the impartiality and integrity of the judiciary in Pennsylvania, as well as in Minnesota and other jurisdictions, will be gravely undermined.[1]

STATEMENT OF THE CASE

PMC accepts and adopts the statement of the case as set forth in the Brief for Respondents Kelly, *et al.*

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1. This *amicus curiae* brief is filed with the written consent of all parties, which has been separately filed with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners and the *amici* supporting them portray the announce clause of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct as, alternatively, an assault on Minnesota's elective judicial system or a well-meaning but grossly overbroad proscription of speech that requires judicial candidates to remain completely silent regarding their general views on virtually all substantive issues.[2] PMC respectfully submits that, in so arguing, petitioners and the amici supporting them misidentify the interest at issue in this case and misread to the point of destroying the announce clause.

There are two issues before the Court: whether Minnesota has a compelling interest that is furthered by the announce clause, and, if so, whether the clause is narrowly tailored to further that interest. As discussed below, the announce clause is constitutional and the decision of the Eighth Circuit Court of Appeals should be affirmed. Minnesota has an indisputably compelling interest in maintaining an impartial judiciary. As construed by the courts below and by the Minnesota Supreme Court, the announce clause is narrowly tailored to serve that interest.

The bedrock principle of our Nation is that it is a government of laws, not of men. The very essence, the

2. The first argument is pressed primarily in the brief of petitioners Gregory F. Wersal, *et al.*, which maintains that the announce clause "completely circumvents the purpose and structure of the Minnesota elective judicial system—[h]olding Minnesota judges accountable to the electorate every six years in open, competitive elections." Brief for Petitioners Gregory F. Wersal, *et al.*, at 12. Petitioners Republican Party of Minnesota, *et al.*, on the other hand, seemingly concede that the announce clause seeks to protect judicial impartiality rather than to undermine Minnesota's elective judicial system, but argue that the clause goes "too far" by prohibiting judicial candidates' discussion of their "general views of the law." Brief for Petitioners Republican Party of Minnesota, *et al.*, at 2-3. Other *amici* supporting petitioners make similar arguments, which are discussed below.

definition, of the rule of law is that each case will be judged—and will be perceived to have been judged—without prejudice or predisposition but rather on its own merits. Thus, without an impartial judiciary in fact and appearance, there can be no rule of law. Contrary to the suggestion of petitioners and the *amici* supporting them, the concept of impartiality is neither inconsistent with, nor diluted in the context of, an elective judicial system, even if in practice it may be undermined in such a system. Impartiality is an essential component of every judiciary—federal or state, appointed or elected. It is difficult to imagine a more compelling state interest than Minnesota's interest in protecting the impartiality of its judiciary.

It follows that Minnesota and other states with elected judiciaries, including Pennsylvania, are entitled to regulate, within narrow confines, the rhetoric of judicial campaigns. Permitting judicial candidates to troll for votes with announcements of their predispositions on issues likely to come before them if they are elected undermines public confidence in the impartiality of the judiciary and condones the prejudgment of cases, which is anathema to our system of justice. The announce clause is therefore necessary to advance states' compelling interest in ensuring the impartiality of, and public confidence in, an elected judiciary.

Minnesota's announce clause is narrowly tailored to advance this compelling state interest. Petitioners and Circuit Judge Beam in dissent below portray the announce clause as an unlimited proscription of all substantive speech. This argument has been effectively foreclosed by a recent order of the Minnesota Supreme Court adopting the narrow construction of the announce clause set forth in the Eighth Circuit's opinion in this case. Moreover, such a broad construction is not compelled by the plain meaning of the clause and contravenes the clause's purpose to protect the impartiality of the judiciary. Under the narrow construction definitively adopted by the Minnesota Supreme Court, the announce clause prohibits only announcements of candi-

dates' conclusions or predispositions on issues likely to come before them if elected.

Thus understood, the announce clause leaves a broad field of issue-related speech open to judicial candidates: candidates may discuss their knowledge of the law and of judicial precedents, arguments pro and con on disputed legal and political issues, matters of judicial philosophy, and the like. All that is prohibited are announcements of predispositions to rule in a particular way on specific issues that are likely to come before the court. Far from an unworkable or unconstitutionally vague standard, this has been the line walked in confirmation proceedings by many of the Justices of this Court without fear of sanction.

In short, the announce clause protects the impartiality of Minnesota's judiciary and is neither inconsistent with the elective judicial system nor the all-encompassing gag rule that its opponents portray. Rather, it proscribes a narrow category of judicial campaign rhetoric that in and of itself reflects the candidate's unfitness to serve in any judicial system. The announce clause therefore does not violate the First and Fourteenth Amendments of the United States Constitution. The decision below should be affirmed.

ARGUMENT

The announce clause of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct is undoubtedly a constraint imposed by the state on judicial candidates' First Amendment right to free speech. Because "[f]reedom of speech reaches its high-water mark in the context of political expression," the court below invoked strict scrutiny and, applying that standard, determined that the announce clause is narrowly tailored to serve a compelling state interest. *See Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 861, 864, 883 (8th Cir. 2001).

PMC accepts this level of review. Two issues, therefore, are before the Court: whether Minnesota has a compelling interest that is furthered by the announce clause, and, if so,

whether the clause is narrowly tailored to further that interest. Each of these issues is addressed below.

I. MINNESOTA'S INTEREST IN THE ACTUAL AND PERCEIVED IMPARTIALITY OF ITS JUDICIARY IS COMPELLING

A. The Interest At Stake Is The Impartiality Of The Judiciary, Not The Integrity Of Minnesota's Elective Judicial System

Petitioners' fundamental error, the error that throws their entire argument askew, is to misstate the interest at stake in this case. "This case," petitioners contend, "is . . . about the integrity of the selection process the people of Minnesota have adopted for its judicial officials—popular election . . . ." Pet. for Writ of Certiorari, at 14. *See also* Brief for Petitioners Gregory F. Wersal, *et al.*, at 12. That is not what this case is about. Rather, this case is about the integrity of the bedrock of our Nation: the rule of law. It is about the fundamental requirement that judges decide —and be perceived to have decided—cases on the facts and law before them rather than on prejudice and bias. The fact that judges in Minnesota (as in Pennsylvania and other states) are elected does not alter the state's fundamental and compelling interest in protecting the actual and perceived impartiality of its judiciary. Judges, in other words, are different from governors or legislators. *See Kelly*, 247 F.3d at 862; *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137, 142 (3d Cir. 1991) ("The functioning of the judicial system differs markedly from those of the executive and legislative."); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.").

Very early in our history, this Court, through Chief Justice Marshall, identified the rule of law as a cardinal principle:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. * * * The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). But the laws can furnish no remedy without the public's confidence in the impartiality of the judiciary, for, absent that confidence, the judiciary has no power, has "neither Force nor Will, but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The power of the judiciary—whether federal or state, appointed or elected—depends upon the public's respect for its judgments, which in turn depends upon the public's confidence in its impartiality:

> [The requirement of neutrality in adjudicative proceedings] preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (internal citation and quotation marks omitted).

What this case is about, then, is the efficacy of courts' judgments, not the integrity of, or any encroachment upon,

Minnesota's prerogative to have an elected judiciary. It is about whether Minnesota's citizens, and the citizens of other states with elected judiciaries, will accept their judges' decisions as disinterested and impartial, as based on principles of law and the facts presented, as reached without fear or favor, as untainted by explicit or implicit commitments made under the pressure to win votes.

B. Neither The Announce Clause Nor The Concept Of Impartiality Encroaches Upon Minnesota's Elective Judicial System

In petitioners' view, the announce clause may be appropriate in the context of an "independent" judiciary, but it is inconsistent with the concept of an elected, "dependent" judiciary. Brief for Petitioners Gregory F. Wersal, *et al.*, at 16-17. *See also* Brief of *Amici Curiae* State Supreme Court Justices, at 6-9. Because elected judiciaries are, according to petitioners, by their very nature politically dependent, judicial candidates should and must be free to announce their views on issues likely to come before them if elected—how else can the electorate be expected to make meaningful and informed choices at the ballot box? *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 29-31.

Petitioners' view that the announce clause is inconsistent with the elective judicial system is stated with particular clarity by *amici* State Supreme Court Justices. "The recurring election of jurists," they say,

> is such a fundamental departure from the federal model that it is often a mistake to adopt federal norms as the standard for jurists in an elective system. Instead, elections create their own baseline norms about the proper role of elected jurists, the nature and scope of judicial independence, and the requirements of judicial integrity. * * * Unlike the federal courts, which primarily focus on interpreting rules created by the Constitution, statutes, and regulations, state courts

> have the added power and responsibility to create substantive rules governing behavior across a wide spectrum of daily life. * * * Whatever the merit of the federal ideal of a wholly independent judiciary, elected state courts, by design, are *not* independent of the electorate. The very point of elections is to make jurists accountable for their decisions by subjecting them to repeated tests at the ballot box. * * * This Court thus should resist relying on familiar norms of judicial independence from the federal courts and give thorough consideration to the structural and conceptual limits on judicial independence that flow from the existence of recurring elections and enhanced law-making authority.

Brief of *Amici Curiae* State Supreme Court Justices, at 6-9 (citations omitted, emphasis in original).

Thus, according to *amici*, "a certain degree of political responsiveness is not only permissible, but is an intrinsic and expected element of the elective judicial role." *Id.* at 4. Although PMC profoundly disagrees with this analysis, its candor is nevertheless to be welcomed, for its assumptions and conclusions shake the very foundation of any system of justice. One of the great services this Court can render by its decision in this case is to make clear that there are no such differences between federal and elected state judiciaries.

Swept along by their emphasis on the fact that Minnesota judges are elected, petitioners and the *amici* supporting them frame the issue in this case in the starkest terms, succinctly stated by Circuit Judge Beam in dissent below:

> It may be, as a matter of policy, that an appointed judiciary best protects our liberties. I certainly think so, and the court obviously agrees. But Minnesota has made a different choice, and having chosen an elective selection method it cannot then turn around and quash candidates' constitutionally guaranteed rights. The

> upshot is this: when a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association.

Kelly, 247 F.3d at 897 (Beam, J., dissenting). The only constraint *amici* State Supreme Court Justices are willing to accept is that judicial candidates may be prohibited from explicitly promising to violate "non-discretionary judicial duties." Brief of *Amici Curiae* State Supreme Court Justices, at 28-30. In all other matters, *amici* say, judicial candidates must be free to speak without constraint.

Petitioners' portrayal of the announce clause as inconsistent with, and a frontal attack on, the elective judicial system is the consequence of their misstatement of the issue. The purpose and effect of the announce clause is to protect the *impartiality* of the judiciary, not to undermine the elective method of selecting judges. Impartiality is simply not a norm more or less applicable depending on the method of judicial selection; it is necessary to any judicial system. *See, e.g., Weiss v. United States*, 510 U.S. 163, 178 (1994) (Rehnquist, C.J.) ("A necessary component of a fair trial is an impartial judge."); *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring) ("One of the very objects of law is the impartiality of its judges in fact and appearance."); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) ("[T]he impartiality of the adjudicator goes to the very integrity of the legal system . . . ."); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (recognizing due process right to an impartial judge).

The First Amendment does not compel a choice between an independent, appointed judiciary and an elective judicial system marked by campaign rhetoric that inevitably undermines the actual and perceived impartiality of the judiciary. Rather, the First Amendment permits a third approach: judicial candidates may be prohibited from undermining the impartiality of the judiciary by stating their predispositions or conclusions on issues likely to come

before them if elected.[3] Petitioners and the *amici* supporting them confuse the concepts of impartiality, accountability, and independence. Only the first is at issue in this case.

To be sure, elected judges are "accountable for their decisions" in the sense that they may be removed from office in the next election. But this type of accountability has nothing to do with the impartiality required of all judges. Upon being elected, as upon being appointed, a judge must be completely impartial. Thus, judges are not, in the true sense of the word, accountable to the electorate; they are accountable only to the rule of law. They are obliged, in other words, to decide every case impartially, on its merits, and in accordance with the law.

Nor is there any difference between federal and state judges' "independence." Contrary to *amici* State Supreme Court Justices' suggestion, elected judges are not permitted, in deference to the electorate, less independence than are appointed judges. A judge's duty to be "independent" means that the judge, whether elected or appointed, is to decide every case impartially, as the law requires, independent of all other considerations, including how the decision might be viewed by the electorate. *Amici* State Supreme Court Justices' error, like the error of petitioners, is to misstate the issue in this case.

In short, this case has nothing to do with states' prerogative to choose an elected judiciary or with any supposed difference between the norms applicable to appointed and elected judges. It is about Minnesota's ability to further its compelling interest in protecting the actual and perceived impartiality of its judiciary.

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3. So that there can be no misunderstanding, PMC notes that it believes that a "merit selection" process—in which a nominee chosen by the governor from a list of persons recommended by a nonpartisan committee, if confirmed by the Senate, serves a relatively brief term and then runs for a full term in a retention (yes/no) election—is preferable to an elective judicial system. The relative merits of elective and merit selection systems, however, are not at issue in this case.

II. THE ANNOUNCE CLAUSE IS NECESSARY TO ACHIEVE THE FACT AND APPEARANCE OF JUDICIAL IMPARTIALITY

To go back to first principles by discussing judicial impartiality and quoting Chief Justice Marshall and Alexander Hamilton would seem gratuitous as platitude. And yet, petitioners seem bent on abandoning or at least ignoring first principles, for the result they seek—the invalidation of the announce clause—would result in campaign rhetoric that would undermine and ultimately destroy public confidence in the impartiality of the judiciary.

A. Both Common Sense And Experience Demonstrate That Campaign Statements Made Under The Pressure To Win Votes Can Undermine Public Confidence In The Impartiality Of The Judiciary

There is no question that judicial candidates are placed under great pressure during election campaigns to signal how they would rule on issues likely to come before them if elected. While many candidates can be trusted to preserve the public's confidence in the impartiality of the judiciary by refraining from announcing their predispositions or conclusions regarding these issues, many others cannot resist the pressure, as evidenced by the following examples of recently sanctioned conduct:

- distributing material that invited the electorate to "imagine a judge who [would] go to bat for [law enforcement]," that claimed that the candidate would "always have the heart of a prosecutor," and that predicted that "defense attorneys would not be happy" with the candidate on the bench. *In re McMillan*, 797 So. 2d 560, 562-63 (Fla. 2001);

- campaigning as a judge who "favors the death penalty for convicted murderers." *In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 422, 425

(Comm'n of Five Judges Appointed By Supreme Court of Ohio 1999);

- assuring that candidate would not "experiment with alternative sentences or send convicted child molesters home for the weekend . . . . Criminals belong in jail, not on the street." *In re Polito*, 1998 WL 939714, at * 1 (N.Y. Comm'n Jud. Conduct Dec. 23, 1998);
- promising to "stop suspending sentences" and to "stop putting criminals on probation." *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997); and
- distributing campaign literature that included the statements "The Authentic Right to Life Judicial Candidate," "Life . . . The Verdict For All Of God's Children" and that the candidate "Needs and Deserves the Support Of All Who Cherish Life." *In re Mullin*, 2000 WL 1603819, at * 1 (N.Y. Comm'n Jud. Conduct Sept. 25, 2000).

All of these statements announce a predisposition that leaves very little doubt as to how the candidate would decide cases likely, if not certain, to come before the candidate if elected. In doing so, each of the statements calls into question the candidate's ability and desire to be impartial and to decide each case on its particular facts and according to the law—to honor the principle that an accused is presumed innocent until proved guilty beyond a reasonable doubt; to fashion a sentence according to the particularized facts and consistent with the discretion available to a judge; to recognize that, under the law as determined by this Court, women have the right, within limits, to an abortion, albeit profound and sincere disagreement exists as to whether that should be the law.

The facts of *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137 (3d Cir. 1991) are particularly instructive on the necessity of the announce clause if judicial impartiality is not to be undermined by campaign rhetoric. *Stretton* involved a First Amendment challenge to Pennsylvania's announce clause, which is identical to the Minnesota clause at issue in this case. *See* Pennsylvania Code of Judicial Conduct Canon 7(B)(1)(c).

In 1991, shortly before a judicial election, the United States District Court for the Eastern District of Pennsylvania enjoined enforcement of Pennsylvania's announce clause. *See Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 763 F. Supp. 128, 131 (E.D. Pa. 1991). The district court's injunction was later vacated by the Third Circuit Court of Appeals, but not until it had been in place for nearly five months. *See Stretton*, 944 F.2d at 144.

During the period the injunction was in effect, several judicial candidates availed themselves of the opportunity to "announce their views on disputed legal or political issues." Some of the results, as reported in a candidates' forum published in a Lancaster County, Pennsylvania newspaper, were as follows:

> Q: Do you have any significant concerns about police overstepping their authority in gathering evidence, taking statements, or building cases? In your experience, is the testimony of police officers in Lancaster County more or less reliable than that of defendants?
>
> A: [Judicial Candidate Reinaker:] There is no question in my mind that the testimony of police is more reliable than defendants. I've seen very little evidence that our law enforcement officers overstep their bounds. The incident of brutality [in] Los Angeles is unfortunate, but it tarnished the reputation of a whole field of people. I talk to children about drug abuse, and not long after that incident, kids were asking whether they can trust police. That's sad. There's not that cause for concern here.
>
> * * *

> Q: In your view, are Christmas celebrations appropriate in the county courthouse?
>
> A: [Judicial Candidate Mecum:] Yes, those celebrations are appropriate. I've been to several myself. I don't think Christmas should be celebrated to the exclusion of others. If other religions want to have similar celebrations, that's fine. This doesn't "establish" a religion to the detriment of others. It's harmless. It's like putting "In God We Trust" on our coins.

Ernest Schreiber, *Judge Candidates Speak Out About Abortion, the Death Penalty, and Other Issues*, Lancaster *New Era*, May 15, 1991.

Of course, such statements are not surprising; they are what one would expect in the heat of a gubernatorial or legislative election campaign. In judicial campaigns, however, these types of statements do grave harm to the actual and perceived impartiality of the judiciary. As the Third Circuit observed in *Stretton*, it "requires no extended discussion to demonstrate the damage" these types of statements do to public respect for the judgments of the courts:

> If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.

944 F.2d at 142. The Eighth Circuit rightly came to the same conclusion in its decision below. *See Kelly*, 247 F.3d at 870 (summarizing evidence of "the threat to the integrity or reputation of the judiciary from involvement with partisan politics").

The necessity of some constraints on judicial candidates' statements, like those set forth above, cannot reasonably be questioned. An elective judicial system with no formal limits on announcements of candidates' predispositions will quickly turn into a "race to the bottom" in which candidates, willingly or begrudgingly, announce how they would rule on particular issues if elected. There can be no confidence in the impartiality of the judiciary—there can be only skepticism and doubt—when that occurs.

B. The Pledges Or Promises Clause Is Insufficient To Protect The Impartiality Of The Judiciary

Petitioners and the *amici* supporting them assure the Court that the "pledges or promises" clause of Canon 5(A)(3)(d)(i), which prohibits the making of "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," imposes a proper and sufficient limit on campaign rhetoric so as to render the announce clause unnecessary.[4] *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 35, 37-38; Brief of *Amici Curiae* State Supreme Court Justices, at 14-15, 28-30. Petitioners' argument in this regard is conspicuously understated, perhaps because the principal case upon which they rely for the unconstitutionality of the announce clause held the pledges or promises clause unconstitutional as well. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228-30 (7th Cir. 1993). Regardless, it is clear that the pledges or promises clause, while necessary to the protection of judicial impartiality, is insufficient to achieve that end.

---

4. In addition, petitioners suggest that impartiality can be sufficiently guarded in specific cases by, among other mechanisms, motions to disqualify or recuse judges that might be partial. *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 9-10, 38. Such protections are no substitute for the announce clause, however, as they do nothing to further the state's compelling interest in maintaining public confidence in the impartiality of the judiciary.

As the Eighth Circuit correctly determined, the pledges or promises clause does not reach the full range of campaign rhetoric that can undermine the actual and perceived impartiality of the judiciary:

> To be sure, the pledges and promises provision of Canon 5(A)(3)(d)(i) addresses the type of campaign conduct that most blatantly subverts the judicial office—pledges by candidates to make specific decisions on the bench. However, it does not reach the full range of campaign activity that can undermine the State's interests in an independent and impartial judiciary. It would not, for example, reach declarations by candidates that legislation relating to hot-button social issues is or is not constitutional. It also would not apply to candidates who publicized their opinions about how unsettled legal issues should be resolved. Both instances raise the specter that the candidates are declaring how they would decide questions that might come before them as judges in order to gain support for their candidacies.

Kelly, 247 F.3d at 877.

The correctness of the Eighth Circuit's conclusion in this regard is demonstrated by the circumstances surrounding the *Stretton* case, discussed above. While the district court in that case invalidated Pennsylvania's announce clause, the pledges or promises clause—which is identical to Minnesota's clause—was not challenged and remained in effect. *See Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 763 F. Supp. 128, 131 (E.D. Pa.), *vacated in part*, 944 F.2d 137 (3d Cir. 1991). Mindful that they were still prohibited from making "pledges or promises of conduct in office," several candidates felt free—and were in fact able without fear of sanction—to announce their views on police misconduct, religious displays, and other issues, as discussed above. *See supra* at 13-14.

Simply put, the Court need not speculate about whether the announce clause is necessary to the protection of judicial

impartiality or whether the pledges or promises clause is a sufficient measure. Experience has demonstrated the necessity of the announce clause and the insufficiency of the pledges or promises clause, which on its face does not reach the range of campaign rhetoric that must be proscribed if the actual and perceived impartiality of the judiciary is to be protected.

III. THE ANNOUNCE CLAUSE, PROPERLY CONSTRUED, DOES NOT VIOLATE JUDICIAL CANDIDATES' FIRST AMENDMENT RIGHTS

A. The Courts Below And The Minnesota Supreme Court Have Definitively Construed The Announce Clause

The district court below construed the announce clause to prohibit only "discussion of a judicial candidate's predisposition to [sic] issues likely to come before the court." *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999). The Eighth Circuit affirmed the district court's interpretation. *See Kelly*, 247 F.3d at 881-83. Of critical importance to this Court, the Minnesota Supreme Court has recently adopted the Eighth Circuit's narrow construction of the announce clause and has therefore put to rest any doubt regarding the clause's proper interpretation. *See In re Code of Judicial Conduct*, ___ N.W.2d ___, No. C4-85-697, 2002 WL 126537 (Jan. 29, 2002) ("[T]he announce clause of Canon 5(A)(3)(d)(i) shall be enforced in accordance with the interpretation of that clause by the United States Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001).").

Petitioners argue that the courts below improperly adopted this limiting construction because, they assert, the announce clause is unambiguously broad and therefore not "readily susceptible" to a limiting construction and because the Minnesota Supreme Court has implicitly adopted a broad interpretation of the clause inconsistent with the

limiting construction. *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 26-29. These arguments are unavailing in light of the Minnesota Supreme Court's recent order adopting the Eighth Circuit's narrow construction of the announce clause. Because federal courts, including this Court, must respect the interpretation of state law announced by the highest judicial tribunal of the state, the announce clause's proper construction is no longer at issue in this case. *Cf. Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *North Carolina v. Butler*, 441 U.S. 369, 376 n.7 (1979); *Brown v. Ohio*, 432 U.S. 161, 167 (1977). The only issue before the Court is whether the announce clause—as construed by the courts below and by the Minnesota Supreme Court—violates the First Amendment. For the reasons discussed below, it does not.

B. As Construed By The Courts Below And By The Minnesota Supreme Court, The Announce Clause Is Narrowly Tailored And Therefore Does Not Violate The First Amendment

1. The Announce Clause Prohibits Only Statements Of Predisposition On Issues Likely To Come Before The Court, Not Discussions Of Issues

The construction set forth by the courts below and adopted by the Minnesota Supreme Court limits the text of the announce clause in two important ways: it limits the *type* of speech proscribed to statements of "predisposition," and it limits the *scope* of issues covered to those that are "likely to come before the court." Drawing on the precedents of the Minnesota Board of Judicial Standards, the Eighth Circuit clarified the wide range of speech that is not proscribed by the announce clause thus construed. Speech that demonstrates a candidate's knowledge of the law and judicial precedent, details a candidate's judicial philosophy, or sets forth his or her views on issues of judicial administration is entirely permissible. *See Kelly*, 247 F.3d at 882. Candidates' discussion of their character, fitness, integrity, background (other than political party affiliation), education, legal experience, and work habits is likewise not proscribed. *See id.*

Inexplicably, petitioners and the *amici* supporting them ignore the fact that the courts below construed the announce clause to proscribe only statements of *predisposition* rather than general discussions of issues. Instead, petitioners assume that the announce clause prohibits "the public expression of general views on disputed legal and political issues." Brief for Petitioners Republican Party of Minnesota, *et al.*, at 8. Although petitioners acknowledge in passing the construction limiting the announce clause to statements of predisposition, they never deal with its import but rather proceed to cast the announce clause in the broadest possible terms.[5]

In arguing that the announce clause is grossly overbroad, petitioners and the *amici* supporting them rely heavily on *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993). *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 21-23; Brief of *Amici Curiae* American Civil Liberties Union and Minnesota Civil Liberties Union, at 11-13. In *Buckley*, the Seventh Circuit held that Illinois' announce clause, which was at the time identical to the clause at issue here, violated the First Amendment right to free speech of a judge running for election to the Illinois Supreme Court. *See Buckley*, 997 F.2d at 230. The court acknowledged the compelling interest underlying the announce clause, but went on to conclude that, in furthering

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5. Petitioners rely on dictum from a Minnesota Supreme Court opinion deciding an issue under Minnesota's election law to support their broad reading of the announce clause. *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 24-26 (discussing *Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979)). As discussed above, however, the Minnesota Supreme Court has now clarified that the announce clause is to be construed narrowly, and petitioners' argument must therefore fail.

this interest, the announce clause "gags" the judicial candidate:

> He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade*. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability—or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform. All these are disputed legal or political issues.

Id. at 228 (citation omitted). In sum, according to the *Buckley* court, the judicial candidate's "only safe response . . . is silence." *Id.* The court likewise concluded that construing the announce clause to proscribe only announcements of views on "issues likely to come before the court" has no effect on the clause's scope because "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Buckley*, 997 F.2d at 229. Convinced that the announce clause requires "complete silence" on the part of judicial candidates, the court declared the clause unconstitutional as overbroad. *See id.* at 231.

Buckley presents an immediate problem for petitioners in that it dealt primarily with the interpretation of the announce clause in the absence of binding Illinois authority. *See Buckley*, 997 F.2d at 229-31. The primary issue addressed by the court was whether the announce clause was to be construed "literally" or with a limiting construction. *See id.* at 228, 230. As discussed above, the Minnesota Supreme Court has answered that question: the announce clause is to be construed in accordance with the limiting construction set forth in the Eighth Circuit's

opinion below. *See In re Code of Judicial Conduct*, ___ N.W.2d ___, No. C4-85-697, 2002 WL 126537 (Jan. 29, 2002).

Thus, *Buckley* did not decide the issue presented in this case, *i.e.*, whether the announce clause is constitutional when read as proscribing only statements by judicial candidates of their "predispositions" on issues likely to come before the court. Instead, *Buckley* specifically held that it would *not* decide that issue because it "was not authorized" to construe the announce clause "as might be necessary to render it constitutional." *Buckley*, 997 F.2d at 230. Consistent with, and emphasizing, this conclusion, the *Buckley* court distinguished *Stretton* on the grounds that the Third Circuit "seems to have understood the [announce clause] to be confined to campaign statements that would leave the impression that a case had been 'prejudged.'" *Buckley*, 997 F.2d at 230. Thus, the *Buckley* court held the announce clause unconstitutional primarily because it was not willing to construe the clause as the Court is bound to construe it in this case—as limited to *statements of predisposition* on issues likely to come before the court.

The *Buckley* court failed to explain why it regarded itself as "not authorized" to construe the announce clause narrowly beyond citing a law review article on the dangers of federal courts assuming the role of a Council of Revision. *See Buckley*, 997 F.2d at 230. It was this failure that caused the Eighth Circuit below to find *Buckley* unpersuasive. As the court noted, "*Buckley* gives little heed to 'our task [as courts] to construe [laws] so as to comport with constitutional limitations' if consistent with the will of the lawmaker.'" *Kelly*, 247 F.3d at 881 n.24 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973)). *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("The elementary rule is that every reasonable construction must be resorted to in order save a statute from unconstitutionality.").

Had *Buckley* heeded this Court's admonition and construed the announce clause narrowly, as the courts below in this case did and as the Minnesota Supreme Court has now definitively done, it should have upheld the clause, for the purpose of the announce clause is to protect the impartiality of the judiciary and its language is readily susceptible to a limiting construction in furtherance of that purpose.

Canon 1 of the Minnesota Code of Judicial Conduct provides that the provisions of the Code should be construed to further the Code's overall purpose:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and personally observe those standards in order to preserve the integrity and independence of the judiciary. *The provisions of this Code should be construed and applied to further that objective.*

Minnesota Code of Judicial Conduct Canon 1 (emphasis added). The *Buckley* court ignored this directive. The court duly acknowledged the purpose of the announce clause:

> [T]he concern [as stated by defendants' counsel] which animates the rule is precisely that a candidate in a judicial election might, in order to attract votes or to rally his supporters, make commitments to decide particular cases or types of cases in a particular way and having made such a commitment would be under pressure to honor it if he won the election and such a case later came before him. This commitment, this pressure, would hamper the judge's ability to make an impartial decision and would undermine the credibility of his decision to the losing litigant and to the community.

997 F.2d at 228. Having acknowledged the purpose of the announce clause, however, the court proceeded to construe

the clause so literally as to invalidate it and thereby defeat the clause's purpose.

A chief failing of both *Buckley* and the arguments of petitioners is the failure to recognize that the announce clause, on its face, is narrowly tailored by virtue of its limitation to "announcements" of views. Moreover, the clause can readily be limited to prohibit only statements of predisposition—as the courts below and the Minnesota Supreme Court have done—so as to make its constitutionality as a narrowly tailored proscription even more clear. *Buckley*, in contrast, focused almost exclusively on the meaning of "issues," arguing that "search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability—or for that matter about laissez faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform" are all issues the discussion of which is prohibited. 997 F.2d at 228.

The announce clause need not be read to prohibit discussion of any of these issues. The obvious and most logical interpretation of the clause's prohibition of "announc[ing] views" is that candidates may not announce their *conclusions* or *predispositions* regarding such issues: the prohibition is of statements by candidates of how an issue should ultimately be decided. Under this construction of the announce clause, which has been adopted by the Minnesota Supreme Court, candidates may discuss case law on search and seizure or any other issue likely to come before the court. *See Kelly*, 247 F.3d at 882. What they may not do is go the final step; they may not state their conclusions regarding, or their predispositions as to how they would decide, such issues.

The rationale for this distinction is simple: discussions of issues demonstrate judicial candidates' knowledge and experience, while announcements of conclusions or predispositions undermine public confidence in candidates' willingness and ability to be impartial. It is entirely possible for

judicial candidates to discuss issues without undermining the public's confidence in their impartiality. While the public is entitled to know whether judicial candidates appreciate issues and understand arguments pro and con, the public must also have confidence that, if elected, the candidates will consider issues with an open mind and will impartially weigh arguments elucidated by the facts and briefing in particular cases without prejudgment or predisposition. This confidence is what the announce clause protects.

2. The Announce Clause Is Not Unconstitutionally Vague

Petitioners argue that the interpretation of the announce clause discussed above is unconstitutionally vague. *See* Brief for Petitioners Gregory F. Wersal, *et al.*, at 39-40. This is simply not the case. While the announce clause is not susceptible to a bright line interpretation—no sensible rule governing these matters could be—it has proved to be a completely workable standard.

Perhaps the best proof that a rule, such as the announce clause, is workable when understood to permit discussion of issues but not announcement of predispositions is the confirmation process for the federal judiciary. Many of the Justices of this Court, during their confirmation hearings before the United States Senate, discussed disputed legal and political issues without announcing their conclusions regarding, or their predispositions as to how they would decide, such issues. *See, e.g., Hearings Before the Senate Comm'n on the Judiciary on the Nomination of Sandra Day O'Connor to be Associate Justice of the Supreme Court of the United States*, 97th Cong., 1st Sess. 61-63, 79, 98, 107-08, 125, 127, 134 (1981) (nominee Sandra Day O'Connor discussing case law and scholarship regarding constitutional right to privacy and abortion but declining to state a conclusion as to whether *Roe v. Wade* was correctly decided); *Hearings Before the Senate Comm'n on the Judiciary on the Nomination of Ruth Bader Ginsburg to be Associate Justice*

of the Supreme Court of the United States, 103d Cong., 1st Sess. 121-22, 124, 136-37, 165-68, 243-44 (1993) (nominee Ruth Bader Ginsburg discussing case law and her general views on gender discrimination but declining to state a conclusion as to whether strict scrutiny should be applied to gender based classifications); *Hearings Before the Senate Comm'n on the Judiciary on the Nomination of Stephen G. Breyer to be Associate Justice of the Supreme Court of the United States*, 103d Cong., 2d Sess. 110-14 (1994) (nominee Stephen G. Breyer discussing case law and commentary on Fifth Amendment takings clause generally but declining to state specific conclusions as to this matter).

If petitioners and the *Buckley* court were correct, virtually every member of this Court has repeatedly violated applicable canons of professional conduct during the confirmation process. *See generally* Model Rules of Professional Conduct Rule 8.2(c). This, of course, is absurd. The Justices of this Court—like judicial candidates in Minnesota, Pennsylvania, and elsewhere—are perfectly capable of walking the line the announce clause draws, and petitioners' suggestion to the contrary is unwarranted. The announce clause as construed by the courts below and by the Minnesota Supreme Court is therefore not unconstitutionally vague.

CONCLUSION

Every judge, whether appointed or elected, has an equally strong obligation to be and to appear impartial—an obligation fundamental to our system of justice and necessarily at odds with campaign rhetoric that signals candidates' conclusions or predispositions on issues they may be called upon to decide if elected. The announce clause of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, as definitively interpreted by the Minnesota Supreme Court, is narrowly tailored to further Minnesota's interest in protecting the impartiality of its judiciary, and therefore does not violate the First and Fourteenth Amendments of the United States Constitution.

The decision of the Eighth Circuit Court of Appeals should therefore be affirmed.

Respectfully submitted,

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REPUBLICAN PARTY OF MINNESOTA, et al.,

Petitioners,

v.

KELLY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AD HOC COMMITTEE OF FORMER JUSTICES AND FRIENDS DEDICATED TO AN INDEPENDENT JUDICIARY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS SUPPORTING AFFIRMANCE

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INTEREST OF AMICUS CURIAE[1]

The Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary ("AHC") is a group of former state Supreme Court Chief Justices, Justices and others[2] dedicated to preserving the independence of and impartiality of the judiciary. The AHC offers this Court a unique perspective on Minnesota's Canon 5 that comes from its members' collective experience on the

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[1] Pursuant to Rule 37.6 of this Court, *amicus curiae* states that no party had any role in writing this brief and that no one other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties.

[2] The Co-Chairs of the AHC are Former Chief Justice of the Texas Supreme Court, John L. Hill; Former Chief Justice of the Minnesota Supreme Court, A.M. (Sandy) Keith; and Former Chief Justice of the California Supreme Court, Malcolm Lucas.

The AHC members are: Former Chief Justices of the North Carolina Supreme Court, James G. Exum, Jr. and Henry E. Frye; Former Chief Justice of the Washington Supreme Court, Robert F. Utter; Former Chief Justice of the Utah Supreme Court, Michael Zimmerman; Former Associate Judge of the New York Court of Appeals, Stewart F. Hancock, Jr.; Former Minnesota Governors Wendell Anderson and Arne Carlson; Former President of the American Bar Association, R. William Ide III; Counsel for the Georgia Judicial Qualifications Commission, James Rawls; Member of the Judicial Inquiry Commission of Alabama, J. Mark White; Professor of Law at Northern Illinois University College of Law, James Alfini; Professor of Political Science at the University of Texas at Dallas, Anthony Champagne; Professor of Law and Director of the Thomas Jefferson Center for the Protection of Free Expression at The University of Virginia, Robert M. O'Neil; and Senior Vice-President, Chief Administrative Officer/General Counsel, Detroit Medical Center, Conrad Mallett, Jr.

The organizations that the AHC Members belong to are listed for identification only.

bench. Some of the AHC's members are former chief justices and justices who have campaigned for elective judicial office and therefore have an educated opinion that there will be a negative impact on the judiciary should a judicial candidate be permitted to "announce his or her views on disputed legal or political issues." Others of the AHC's members are former chief justices and former justices who have served on courts which do not select their members by elections, but, based on their experience, have an educated opinion that most of the public does not make fine distinctions about the way a judge acquired his or her position, so a negative impact on the elective judiciary will lead to a negative impact on all judges, whether elected or appointed. Other members of AHC are former governors of Minnesota, representing both major parties. The former Minnesota governors have a particular dedication to Minnesota's ninety year history of a non-partisan, non-political judiciary.[3] All of the AHC's members believe that a negative impact on our

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[3] Although the issues decided below about party endorsements are not under review, Minnesota's deep tradition of nonpartisanship was reflected when Petitioner Wersal, in 2000, sought party endorsement. At that time, Chief Justice Katherine Blatz wrote to the state party chairman saying "I am not seeking, nor will I accept," a party endorsement. *See Party Snubs Incumbents on Minnesota Supreme Court*, ST. PAUL PIONEER PRESS, June 11, 2000, at 8A; Plaintiff Wersal's Affidavit, paragraph 22 and his Exhibit I in *Wersal v. Lundberg*, No. 00-11685 (D. Minn. 2000).

Chief Justice Katherine Blatz has served as a Republican State Representative from 1979-1994, and as Assistant Minority Leader from 1987-1990 and in 1993.

state judiciary will also damage public confidence in federal judges.

In recent years there has a been a "noticeable trend toward more judicial speech" which the dispute at bar highlights. David M. O'Brien, *Preface*, JUDGES ON JUDGING: VIEWS FROM THE BENCH xv-xvi (1997) (citing Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805 (1995)). At the same time, however, "there remains a firmly entrenched view . . . that judges should remain wholly 'above the fray,' and avoid revealing any of their beliefs or fundamental values to the public" because they may be faced with deciding those previously unresolved questions in subsequent judicial proceedings. *Id.* at xvi. The AHC agree with this latter position, adopting Justice Felix Frankfurter's "judicial lockjaw" concept, whereby judges limit their off-the-bench comments to avoid the appearance of prejudging an issue that might come before them. *Id.* at xiv. The AHC is also concerned that a failure to uphold Minnesota's Canon 5 will impair the Due Process rights of litigants and violate the separation of powers doctrine.

SUMMARY OF THE ARGUMENT

Minnesota's Canon 5 makes good policy sense. It ensures that a judge, once elected, will not be pressured to decide a case based on a campaign promise when the law and the facts of a particular case dictate a ruling contrary to that promise. The Canon also allows judges to remain impartial and independent from partisan politics and special interest coercion. The decision in this case

may affect the confirmation process of the federal judiciary: without canons similar to this one, when the Senate requests that a nominee articulate a position on an issue that may cause the nominee to prejudge a case, the nominee may be forced to answer. Further, if this Court were to produce a broad decision overturning the Eighth Circuit, it would impact not only states that use the elective process, but also systems that use a purely appointive process for judicial selection. Additionally, should this Court fail to uphold the Canon and issue a broad opinion overturning the Eighth Circuit, it would have effects beyond the confirmation process; in fact, it could even extend to post-confirmation inquiries and conduct.

The judiciary's role in the tripartite framework of American government involves neutrally reviewing the actions of the states and the other two branches of Government. No other branch of government has this power. Because of the judiciary's unique role in the administration of justice, Minnesota has an interest in preserving the independence of and impartiality of the institution. In order to maintain the intent of the checks and balances system set up in the federal and state constitutions, the judiciary must remain independent and neutral. The Tenth Amendment gives Minnesota the power to create special rules limiting a judicial candidate's First Amendment rights to meet this compelling state interest.

The Announce Clause in Minnesota's judicial Canon balances, on the one hand, the First Amendment interests of judicial candidates and their views on "disputed legal or political issues," and, on the other hand, the due process rights of litigants, the public's confidence in

judges' open-mindedness, and the states' interest in preserving an effective separation of powers. Therefore, Canon 5 passes constitutional muster because it is narrowly tailored to meet two unique, compelling state interests. First, Minnesota has a compelling state interest in maintaining the integrity of its judiciary and in ensuring the public's confidence in an independent judiciary. The Announce Clause is narrowly tailored in that it ensures that a judicial candidate remains neutral on issues that may come before his or her court in the future, but it does not limit a candidate's right to speak about a particular judicial philosophy, the role of the courts, or the duty to uphold the law.

Further, Minnesota has a compelling state interest in preserving the Due Process rights of its litigants. Civil litigants and criminal defendants alike have constitutional rights to an impartial judge, and the Announce Clause protects these rights. Measures similar to this Canon, when narrowly designed to preserve the right to a fair trial, have been upheld as constitutional. Minnesota's Announce Clause is similarly based upon the compelling state interest of protecting the Due Process rights of litigants and should be upheld.

ARGUMENT

I. Sound Public Policy Arguments Support Affirmance of the Eighth Circuit's Opinion.

The AHC, in part made up of former chief justices and justices of various state supreme courts, is concerned about societal perceptions that the judiciary is biased.

Many members of the AHC understand the pressures and conflicts elected judges face daily in making their rulings. All members of the AHC are concerned that a loss in confidence in the elected judiciary will infect the non-elected judiciary, including the federal judiciary.

A. If a judicial candidate is permitted to essentially make campaign promises *via* announcement of his views, when the law and facts of a particular case obligate him to make a contrary ruling as a judge, he will face internal conflict between the promise he made to the public and the obligations of his oath to follow the law.

If a judicial candidate is permitted to essentially make campaign promises *via* announcement of his views, when the law and facts of a particular case obligate him to make a contrary ruling as a judge, he will face internal conflict between the promise he made to the public and his oath to follow the law. Moreover, the announcement of a judicial candidate's views on particular issues gives, at best, the appearance that a candidate has prejudged a case. The existence of a perception that a judge has prejudged a case hurts the independent and impartial image of the judiciary, regardless of the eventual outcome reached in a case by a particular judge. Although most judges are aware of their duties to independently decide cases that come before them in accordance with the laws of the jurisdiction and not based on any bias or commitments made to campaign supporters, there will also likely be some judges who will not be able to rule impartially after announcing their views on a topic, due to political pressures. Thus, at its worst, this practice pressures

judges to ignore the law in cases involving matters upon which they have made campaign promises.

The Framers intended for the judiciary to be independent and free from this type of influence. *See Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 58 (1982) (explaining that the Framers stressed the importance of judicial independence because otherwise, "there would be too great a disposition to consult popularity"). As a result, the judicial oath of office requires a judge to follow binding precedent and authority, whether he agrees with the law or not. However, if Canon 5 is rejected, the potential exists, especially in a close case, for a judge to be tempted to find ways to distinguish otherwise applicable law to lead to a result that is consistent with his announced views.

To avoid putting a judge in the awkward position of explaining to the public why he or she departed from a stated position in a particular opinion, to avoid the perception that judges prejudge cases, and to avoid tempting judges to "shape" the law to meet campaign promises, Canon 5 does not permit the members of the judiciary to announce their views.

Once the integrity of the judiciary is undermined in states with elective systems, it will not be long before the integrity of the judiciary in non-elective systems is also undermined, since the public does not make fine distinctions based on how a judge is selected. The AHC urges this Court to uphold the constitutionality of Canon 5 by deferring to the Minnesota Supreme Court and affirming the Eighth Circuit's decision.

B. Invalidating the Announce Clause of Minnesota's Canon 5 may also have a negative effect on the selection process for federal judges.

An invalidation of Minnesota's Canon 5 may also have an unanticipated, but profound, impact on the selection process for the federal judiciary. Nominees for the federal bench decline to answer questions about their views on specific, substantive issues during confirmation hearings, explaining that a response might cause them to prejudge an issue that could come before him or her on the bench.[4] This measured response stems, in part, from

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[4] For example, Justice Scalia stated in his confirmation hearing:

> Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused on having a less than impartial view of the matter.

The Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 99th Congress, Second Session, Serial No. J-99-119, p. 37 (Aug. 5-6, 1986).

Other Justices have made similar statements:

> [I]n one sense we are all the product certainly of our experiences. People assume the role of a judge is encumbered, if you will, by the product of those experiences. Judges do, I suppose, as has been pointed out, read newspapers and listen to radio and watch television to some extent, so all are influenced to some greater or lesser degree by those experiences.

the fact that judges may be disciplined for failing to conduct themselves in a manner that promotes public

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> However, the framework within which a given case is decided, in my view, should be limited to the record and to the briefs and the arguments, and should not really be resolved on the basis of outside social concerns, if you will.

The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 97th Congress, First Session, Serial No. J-97-51, pp. 193-194 (Sept. 9-11, 1981).

> Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.
>
> Judges in our system are bound to decide on concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.

The Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 103rd Congress, First Session, Serial No. J-103-21, p. 52 (July 20-23, 1993).

> A judge is not a politician. A judge rules in accord with what the judge determines to be right. That means in context of the particular case, based on the arguments the parties present, in accord with the

confidence in the integrity and impartiality of the judiciary. *See* Leonard Gross, *Judicial Speech: Discipline and the*

> applicable law and precedent. A judge must do that no matter what the home crowd wants, no matter how unpopular that decision is likely to be. If it is legally right, it is the decision that the judge should render. And I also said what a judge should take account of is not the weather of the day, but the climate of an era.

Id. at 303.

> [I]t is important for any of us who are judges, in areas that are very deeply contested, . . . we have to look ourselves in the mirror and say: Are we impartial or will we be perceived to be impartial? I think that to take a position would undermine my ability to be impartial, and I have attempted to avoid that in all areas of my life after I became a judge.

The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 102nd Congress, First Session, Serial No. J-102-40, p. 178 (Sept. 10-16, 1991).

Finally, Justice Souter provided this explanation for why he could not respond to certain questions during his nomination hearing:

> Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have, should be off limits to a judge. . . .
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> Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? . . . [I]t is much easier to modify an opinion if one has not already stated it would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people? You understand the compromise that that would

First Amendment, 36 SYRACUSE L. REV. 1181, 1205 (1986). Nevertheless, Senators have recently become more aggressive in their probing at confirmation hearings, and the AHC submits that a reversal of the Eighth Circuit's decision *via* a broad dismantling of the Announce Clause will give these members of the Senate a tool by which they can force a nominee to answer questions about his personal views on various issues. For example, Chuck Schumer, a Democratic Senator from New York and head of the Judiciary Committee's Subcommittee on Federal Courts, has openly stated that the Senate should consider a judicial nominee's ideology as part of the confirmation process. *See Interview with Congressman Jonathan Kyl*, (Fox News television broadcast, Jul. 28, 2001) (transcript *available in* 2001 WL 7785874) (showing a video clip of Senator Schumer stating "if the President sends countless nominees who are part of a particular ideological cast, Democrats will likely exercise their constitutionally given power to deny confirmation so that such nominees do not reorient the direction of the Federal judiciary"). Senator Schumer also publicly vowed that he would not let judicial nominees avoid taking a stand on abortion policy in their confirmation hearings. *See* Ross K. Baker, *Ground Zero in the Culture Wars*, THE STAR-LEDGER, Jul. 22, 2001. This example shows that although the judiciary is an independent institution, the legislative and executive

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> place upon the judicial capacity and that is my reason for having to draw the line.

The Nomination of David Souter to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Committee on the Judiciary, 101st Congress, Second Session, Serial No. J-101-95 (Sept. 13-19, 1990).

branches are pushing politics into the confirmation process. Overruling the Eighth Circuit's opinion may also have an impact on post-confirmation interviews with judges. Thus, this Court should affirm the Eighth Circuit to avoid these problems.

II. The Judiciary Is Different From the Other Two Branches of Government and Thus Needs Special Rules To Preserve the Independence of the Institution.

The judiciary's unique characteristics support an affirmance of the Eighth Circuit's decision. The judicial branch of the government is *sui generis*. One of the reasons it differs from the other branches is that, unlike the other branches of government, judges are bound to follow the principle of *stare decisis* to decide cases in an impartial manner without succumbing to political pressure or partisanship. Further, it reviews actions taken by the other branches. Thus, the judiciary is not, and should not be, a partisan branch of government beholden to a constituency. A failure to uphold the Eighth Circuit's decision will transform the judiciary into simply another legislature, representing a constituency based on campaign promises. This is especially inappropriate since the judiciary must maintain independence as it reviews the work of the other branches. *See, e.g., U.S. v. Lopez*, 514 U.S. 549, 567 (1995) (invalidating a statute because Congress had gone beyond its Commerce Clause authority).

The State's interest in regulating a judicial candidate's First Amendment rights stems from these differences between judicial candidates and candidates for

other governmental offices. *See In re Chmura*, 608 N.W.2d 31, 39-40 (Mich. 2000); *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) ("states need not treat candidates for judicial office as candidates for other elective offices."). Judges have the unique role in our society of being responsible for the administration of justice, and thus, special rules or regulations governing their elections and campaign speech are necessary. Indeed, the separation of powers principles embraced in both the Federal and the Minnesota Constitutions[5] require the judiciary to remain independent. Thus, Minnesota may, under the Tenth Amendment of the United States Constitution, enact special rules to preserve the integrity of its judiciary.

A. The judiciary is bound by *stare decisis* and therefore is not a legislative body.

The separation of powers principles embraced in the federal and state constitutions authorize and require that Minnesota's Judicial Canon 5 be upheld. In order to maintain the checks and balances system set up in the constitutions under the separation of powers doctrine, the judiciary must remain independent and neutral because, as this Court has recognized, the Framers of the

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[5] The Minnesota Constitution explains that the state government is divided into legislative, executive and judicial departments and specifies that "no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided." MINN. CONST. art. 3, § 1 (West 2001).

federal constitution designed our tripartite form of government to keep each branch "entirely free from the control or coercive influence, direct or indirect, of either of the others." *Bowsher v. Synar*, 478 U.S. 714, 725 (1986). Thus, Minnesota's Canon 5, which is designed to maintain the independence of its judiciary, insures this country's long tradition of judicial neutrality and individualism that is consistent with the founding intent.

To counter this fact, Petitioner Wersal erroneously argues that the Minnesota judiciary is a quasi-legislative body because it helps shape the common law and contends that, as elected officials, judges cannot be held accountable for their actions because of the speech limitations imposed upon them by the Announce Clause. [Petitioner Wersal's Brief at 27]. This argument begins with an overly broad premise: the judiciary does interpret the common law, but is certainly not a legislative body elected to represent a constituency. *See, e.g., Miller v. French*, 530 U.S. 327, 350 (2000) ("separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design").

Instead, the judiciary actually applies the law by employing the principle of *stare decisis*, which means that if an issue of law has been previously decided, there is "a heavy presumption that settled issues of law will not be reexamined." *Equal Emp. Opportunity Comm'n v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986). Thus, as a general rule, it is the judiciary's duty to interpret the law, not make it. *See* John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in* Casey; 42 Buff. L. Rev. 187, 201 (1994) (noting that *stare decisis*

requires a judge to follow precedent rather than fashion his or her own rule of law). The doctrine of "*stare decisis* restrains an individualistic, idiosyncratic, or activist judge from injecting his or her own personal mores and beliefs into the law . . . and prevents the infusion of bias" in judicial decision making. *Id.* Contrary to Petitioners' arguments, the principle of *stare decisis*, which increases the perception of the judiciary's independence, impartiality, and legitimacy, works to make the judiciary different from the other branches because the principle establishes that courts respect previous opinions based on reasoning that is in conformity with the rule of law, and do not decide questions based on campaign promises. *Id.* at 199 (citing Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 3-4 (1971)).

At the founding of this nation, the Framers recognized that the judiciary's "independence from political forces . . . helps to promote public confidence in judicial determinations." *See Northern Pipeline Constr. Co.*, 458 U.S. at 60. To insure this independence, the Framers even placed provisions, such as life tenure and fixed compensation, into the Constitution for Article III judges in order to promote judicial individualism.[6] *Id.* at 59. Minnesota's state Constitution provides that the compensation of judges "shall not be diminished during their term of

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[6] Interestingly, even when the branches are forced to interact, the judiciary stays independent. *See, e.g., Bowsher*, 478 U.S. at 722 (noting that at impeachment proceedings, "the presiding officer of the ultimate tribunal is not a member of the Legislative Branch, but the Justice of the United States").

office," and also contains a division of powers clause. MINN. CONST. art. 6, § 5 (West 2001).

At a state level, Minnesota's Canon 5 is merely another provision designed to promote judicial individualism. The independence of the judiciary must be "jealously guarded" because the Constitution unambiguously commands it. *Northern Pipeline Constr. Co.*, 458 U.S. at 60. Minnesota's Canon 5 follows this Constitutional directive. Thus, this Court should affirm the Eighth Circuit and allow Minnesota to further its interest in an independent, impartial judiciary.

B. The Tenth Amendment authorizes States to make special rules for the judiciary because a state election is an independent state government function.

A failure to uphold the Eighth Circuit when the Minnesota Supreme Court has held it would construe the Canon in the same manner as the federal courts[7] would violate the Tenth Amendment and is contrary to this country's long history of embracing the principles of Federalism[8] since Minnesota's Judicial Canons are the

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[7] *See In re Code of Judicial Conduct*, C4-85-697, ORDER (Minn. 2002).

[8] Federalism describes "the constitutionally prescribed division of governmental responsibilities between the state and the national governments." Emily Wheeler, *The Constitutional Right to a Trial Before a Neutral Judge: Federalism Tips the Balance against State Habeas Petitioners*, 51 BROOK. L. REV. 841, 844, n. 7 (1985). Generally, state appellate courts regulate the conduct of judges within their own system, and a "federal inquiry into a

means by which the sovereign state of Minnesota regulates a core function of its government: judicial conduct and the election of judges. The Tenth Amendment[9] to the Federal Constitution "recognizes and preserves the autonomy and independence of the States." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). The underlying principle behind the Tenth Amendment is that the national government will "fare best if the States and its institutions are left free to perform their separate functions their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The Supreme Court has recognized that as part of a state's right to perform its independent core governmental functions,[10] each state has autonomy over its legislative and judicial departments, meaning that the Federal government may interfere with the power of the state only to the extent the Constitution specifically authorizes. *Garcia*, 469 U.S. at 551; *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S.742, 761 (1982) (acknowledging that a State's right to make fundamental decisions and set its own policies is a "quintessential attribute of sovereignty").

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state's administration of its judiciary is hardly routine." *Id.* at 851.

[9] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. CONST. AM. X.

[10] In *Gregory v. Ashcroft*, the court recognized that a state's right to control its judicial elections was a core government function. 501 U.S. 452, 460 (1991).

If a state activity centers around the core functions of the state government, as this one does, then the federal court should defer to the state court. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (explaining that a state's decision in judicial elections should be free from federal interference, subject to Federal Constitutional limits); *Geary v. Renne*, 911 F.2d 280, 301 (9th Cir. 1990) (Rymer J., dissenting) (explaining that states have a great interest in regulating local elections to insulate them from the national issues that are the focus of national political parties). Thus, the decision of the Minnesota Supreme Court is entitled to deference by this Court because state election procedures reflect the very manner in which the state chooses to operate as a government.

As is stated above, Minnesota's Canon preserves the independence of the judiciary and its litigants' Due Process rights to an impartial judge and, under the principles of Federalism, this is an entirely appropriate action. *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1396 (1997) (explaining that the Framers recognized that the states would have the primary responsibility for enforcing individual rights and would use their legislative powers to be "jealous guardians" of the rights and liberty of its citizens) (quoting The Federalist No. 26). James Madison explained that the Federal Government should be "disinclined to invade the rights of the individual states." *Garcia*, 469 U.S. at 551 (citing The Federalist No. 46, p. 332 (B. Wright ed. 1961)). Because the Framers intended to avoid federal encroachment on states rights, it is appropriate to allow Minnesota to address election issues concerning the judiciary. *See, e.g., id.* (citing 2 Debates in the Several State Conventions

on the Adoption of the Federal Constitution 438-39 (J. Elliot 2d ed. 1876)). Therefore, the AHC respectfully asks this Court to adhere to the decision of the Minnesota Supreme Court by affirming the Eighth Circuit.

III. Compelling State Interests Support Minnesota's Canon 5.

The AHC concedes that the Minnesota judicial canon at issue impacts the First Amendment rights of judicial candidates and recognizes that there must be a compelling state interest to justify the Canon. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). However, Canon 5 passes constitutional muster because it is narrowly tailored to meet two compelling state interests. First, Minnesota has a compelling state interest in maintaining the integrity of its judiciary and in ensuring the public's confidence in an independent judiciary. Second, Minnesota has a compelling state interest in preserving the Due Process rights of its litigants, an important interest that Petitioners fail to recognize. These two compelling interests, when weighed against Petitioner's First Amendment rights, justify Canon 5's restriction on campaign speech.

A. Minnesota has a compelling state interest in both maintaining the independence of the judiciary and in preserving the public's confidence in the judiciary's independence.

"There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Comm., Inc. v. Virginia*, 435 U.S. 829, 848 (1978)

(Stewart, J., concurring). States also have a compelling state interest in "the maintenance of public confidence in the objectivity of its judiciary" and in protecting the integrity and independence of the judiciary. *ACLU*, 744 F. Supp. at 1098; *see also Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (noting that States may "properly protect the judicial process from being misjudged in the minds of the public."); *In re Chmura*, 608 N.W.2d at 40 (noting that states have a special interest in regulating the speech of those who seek election to the bench). As one commentator has recognized, proceedings brought under a state's judicial conduct code are intended to "protect the integrity of the judicial system itself." Gross, 36 SYRACUSE L. REV. at 1216.

Petitioner Wersal erroneously argues that Canon 5, designed to protect the integrity of the system, is unconstitutionally vague because it does not specifically draw a line between permissible and impermissible speech. [Petitioner's Brief at 43]. However, a statute is unconstitutionally vague only if it fails to provide "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Canon 5 does not fall into the category of overly vague statutes. Both the purpose of the Canon, and the words of the Canon themselves, make it clear to people of ordinary intelligence that a judicial candidate may not announce his or her views on disputed legal issues that may come before the court so as to avoid tne appearance that he or she has prejudged the case. In an attempt to establish the Canon's vagueness, Petitioners glibly suggest that the number of matters which may

come before the court are infinite. Petitioners also contend that if a candidate discusses judicial philosophy, which is a permissible topic under the Canon, it may be considered a disputed legal issue in some instances. However, as this Court has recognized, anyone with imagination can conjure up hypothetical cases in which the meaning of a statute is called into question. *Id.* at 733. When it is "clear what the ordinance [or Canon] as a whole prohibits," this Court has refused to speculate about possible vagueness in hypothetical situations. *Id.* Words by their nature are imprecise, and if the Canon leaves some room for interpretation, it is because no statute that regulates speech can possibly list all prohibited comments. *See id.* (noting that "we can never expect mathematical certainty from our language"). Thus, the Canon and the activity it regulates is not overly vague.

Furthermore, both the district court and the Eighth Circuit have construed the Canon to have specificity, and the Minnesota Supreme Court has agreed with its interpretation. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 856 (8th Cir. 2001); *In re the Code of Judicial Conduct*, No. C4-85-697 (Minn. Jan. 29, 2002). The Eighth Circuit explained that candidates may not announce their views on disputed legal or political issues, but may still engage in "general discussions of case law or a candidate's judicial philosophy." *Kelly*, 247 F.3d at 882. Candidates may still call attention to their opponents' records and explain their own background and experience to the electorate. *Id.* This Court should affirm the Eighth Circuit's interpretation of the statute because not only has the Minnesota Supreme Court agreed with the interpretation, but

this Court "normally follows lower federal-court interpretations of state law" and "rarely reviews a construction of state law agreed upon by the two lower federal courts." *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). Thus, this Court should defer to the Eighth Circuit's construction of Canon 5, holding that it passes constitutional muster because it is narrowly tailored to meet the compelling governmental interest of independence of the judiciary.

B. Minnesota has a compelling governmental interest in maintaining and preserving the Due Process rights of litigants.

Minnesota has a compelling state interest in ensuring that the Due Process rights of its citizens are preserved. Recent polls suggest that the American public has complained that politics influences judges in their decisions. Judge J. Thomas Greene, *Some Current Causes of Popular Dissatisfaction with the Administration of Justice*, 198 FED. R. DEC. 566, 568 (2000). The current negative public perception of the judiciary demonstrates the importance of Minnesota's Canon 5 and establishes that the Canon is a rule necessary to preserve the Due Process rights of Minnesota's litigants and reverse, or at least stop the furtherance of, this damaging view of the judiciary. A failure to affirm the Eighth Circuit would allow judges to announce their views and give the appearance of a partisan judiciary that lacks impartiality. *See, e.g., Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) ("If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached

after a fair hearing, giving due consideration to the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.").

Judicial impartiality is the keystone in our concept of justice, and the judiciary is expected to decide legal disputes free from the influence of bias and prejudice. *See* John L. Kane, *Judicial Impartiality: Passionate or Comatose?*, THE JUDGES' JOURNAL, 13 (Fall 2001). Litigants have a constitutional right to expect impartiality from their judges. *Stretton*, 944 F.2d at 144 (noting that "taking a position in advance of litigation, it would inhibit the judge's ability to consider the matter impartially" and suggesting that "the campaign announcement would leave the impression that . . . the case was prejudged rather than adjudicated through a proper application of the law to facts impartially determined."); *see also* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996) (explaining that litigants are entitled to judges that decide the cases before them based upon the applicable law and not their campaign promises). Neutrality and impartiality are the cornerstones of the Fourteenth Amendment's right to Due Process, which requires a neutral and detached judge. *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Calif.*, 508 U.S. 602, 617 (1993).

In a criminal context, there is a Sixth Amendment right to an impartial judge. The corresponding right of a civil litigant is found in the Due Process Clause of the Fourteenth Amendment. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); Gross, 36 SYRACUSE L. REV. at 1239. Trial before an unbiased judge is essential to the Due

Process rights guaranteed to all citizens by the Fourteenth Amendment. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). The Framers valued a neutral, and not just independent, judiciary. As John Adams wrote in the Massachusetts Constitution of 1780, every citizen has the right to a trial by judges "as free, impartial and independent as the lot of humanity will admit." Hiller B. Zobel, *Judicial Independence and the Need to Please*, THE JUDGES' JOURNAL 5, 8 (Fall 2001).

Procedural rules used in the trial of a case demonstrate this country's historical efforts to guarantee each litigant a trial by an impartial tribunal. For example, where a potential fact finder is discovered to be biased against a defendant, the prospective juror will be dismissed. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors"). Even in civil cases, it is "fundamental in our jury system that litigants are entitled to unbiased and unprejudiced jurors." *Hill v. Boling*, 523 S.W.2d 867, 873 (Mo. App. – St. Louis 1975); *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986). If all the potential fact finders have the same bias through pretrial publicity, a change in venue will be granted. *See, e.g., State v. Whalen*, 49 S.W.3d 181, 189 (Mo. 2001).

A neutral judge "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall*, 466 U.S. at 242 (citations omitted). Thus, Minnesota's Canon 5, which preserves

the impartiality of the judiciary, a compelling state interest, is constitutional and should be upheld.

C. Canon 5 is narrowly tailored and permits judges to remain active in the bar.

In stressing the importance of judicial independence, the AHC is not suggesting, of course, that isolationism of judges is the answer to need for a neutral judiciary.[11] Writing, researching and participating in community or bar activities are an important part of increasing a judge's knowledge and awareness of the world. *See* Jack Weinstein, *Limits on Judges Learning, Speaking and Acting*,

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[11] However, there is a delicate balance of how much public, extrajudicial speech should be permitted. As one commentator has noted:

> The simplest rule, a flat ban on public, extrajudicial speech by judges on legal topics, makes no sense. A flat ban would have the virtue of clarity and ease of application, but the vice of over-inclusiveness. On the whole, judges are the cream of the legal profession, and it would be a great waste to limit their contribution to the development of law and society. . . .
>
> An equally simple rule, permitting all public, extrajudicial speech, is . . . equally problematic. The judiciary is the most fragile of the three branches and depends upon public and political acceptance of its processes and judgments. It simply would not do to have judges publicly engaging in the sort of freewheeling debate that routinely take place on the floor of the House of Representatives, for example.

J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 LOY. L.A. L. REV. 851, 854-55 (1995).

36 Ariz. L. Rev. 539, 544 (1994). Lecturing and attending symposiums and conferences on various viewpoints educate judges on emerging trends in the law, adds to the collegiality between the bench and the bar, and improves the judiciary and the legal process generally. *Id.* at 540-555 (discussing the Code of Conduct for federal judges and interpreting it to permit judges to attend conferences, educational programs, and bar association meetings).

Petitioner argues that enforcing Canon 5 to preserve the independence of the bench would engender resentment and suspicion from the public. [Petitioner's Brief at 45]. Petitioner also argues that because judges are elected, there must be a free and open debate about a candidate's ideas. However, the Announce Clause does not silence the judiciary as Petitioner suggests. It merely prevents judges from discussing their views on disputed legal issues that may come before them. Thus, the Announce Clause simply ensures that the public perceives the judiciary to be as neutral as it is.

The public "often associates judges and their conduct with the entire judicial system, and when a judge's conduct is unacceptable, it reflects poorly on the public's perception of the judiciary." Nancy Sholes, *Judicial Ethics: A Sensitive Subject*, 26 Suffolk Univ. L. Rev. 379, 381 (1992). Thus, the perceived integrity of proceedings before the court depends greatly on the neutrality and impartiality of the judge. *See* Wheeler, 51 Brook. L. Rev. at 866. The most effective tool for upholding the integrity of the court is to have judges comply with the state's judicial ethics code. Sholes, 26 Suffolk Univ. L. Rev. at 406. Thus, Minnesota's Canon 5 is the best way to preserve the

integrity of the judiciary, and it is constitutional because it is narrowly tailored to achieve the compelling governmental interest of preserving a litigant's Due Process rights to an impartial and independent tribunal.

D. Due Process and other state interests support slight limitations on First Amendment rights.

Limitations similar to the Announce Clause have been upheld in other aspects of judicial proceedings, such as bans on cameras in the courtrooms and pre-trial gag orders. Similarly, the Announce Clause should also be constitutionally permissible.

For instance, although the media's First Amendment rights are affected when a trial court prohibits cameras in the courtroom, the constitutionality of a ban against cameras has been upheld as a reasonable time, place and manner restriction. *U.S. v. Hastings*, 695 F.2d 1278, 1281-82 (11th Cir. 1983). While the First Amendment generally guarantees the media a right of access to observe and report on criminal trials, "the line is drawn at the courthouse door." *Id.* at 1281 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978)). Courts routinely prohibit cameras in courtrooms for two reasons. First, the maintenance of an orderly, dignified environment free from distractions is appropriate for the solemn nature of judicial proceedings. *U.S. v. Cicilline*, 571 F. Supp. 359, 363 (D. R.I. 1983), *aff'd*, 740 F.2d 952 (1st Cir. 1984). More importantly, the ban insures a fair trial for litigants. *U.S. v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985) (noting that although First Amendment concerns are implicated by denying the media access to criminal trials, the ban is

reasonable because "there is a sense that the knowledge of being televised might cause the judge, jurors or witnesses to be distracted – whether by embarrassment, self consciousness, anxiety or desire to 'star'," and thus, television cameras could actually impair the truth-finding function of the trial).

Likewise, it is permissible to narrow a witness's First Amendment rights when a court issues a gag order prohibiting him from discussing a pending case with the media. Such orders have been upheld when necessary to protect a defendant's right to a fair trial. *See, e.g., In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1983) (concluding that the gag order was constitutional because the potentially inflammatory and prejudicial statements that could be expected from the witnesses had to be suppressed to ensure a fair trial). Gag orders applied to lawyers and the parties have also been upheld as constitutionally permissible when necessary to ensure a fair trial. *See U.S. v. Brown*, 218 F.3d 415, 423 (5th Cir. 2000) (holding that a gag order narrowly drawn to ensure a fair trial does not violate the First Amendment). Thus, courts often balance First Amendment rights with the interests of fair criminal and civil trials. *See id.* at 424.

A ban on campaign speech concerning issues that may come before the court does accommodate a judicial candidate's First Amendment rights with other constitutional values. The restriction should be considered reasonable because it maintains the independence of the judiciary and ensures a litigant's Due Process right to a neutral tribunal in a manner that is analogous to bans on cameras and gag orders. The First Amendment's free speech rights are not absolute and must be applied in the

light of the special characteristics of the relevant environment. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Thus, because of the importance of maintaining an independent judiciary and protecting the Due Process rights of litigants, the Announce Clause should be upheld.

CONCLUSION

For the reasons stated above, *amici* respectfully urge this court to affirm the Eighth Circuit Court of Appeals and uphold the constitutionality of Minnesota's Canon 5.

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IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

VERNA KELLY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF RESPONDENTS

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STATEMENT OF *AMICUS CURIAE* [1]

The Conference of Chief Justices ("the Conference") is the national voice of the State courts in the United States concerning matters of importance in improving the administration of justice. The Conference is comprised of the Chief Justices from the highest courts of each State, the District of Columbia and the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam and the Virgin Islands.

The Conference unanimously authorized the filing of an *amicus* brief at its January 2002 meeting, and this brief has been approved by a special committee of the Conference.

The unique challenges of judicial elections have led to special efforts by Chief Justices from States in which members of the judiciary face election. In December 2000, the Chief Justices from the seventeen most populous such States convened a Summit, chaired by Chief Justice Thomas R. Phillips of Texas, on Improving Judicial Selection. In January 2001, a Call To Action was issued stating the Summit's recommendations. *See Call To Action*, 34 Loy. L.A. L. Rev. 1353 (2001). Among those recommendations were two that dealt with the Canons on judicial campaign activity. The Summit urged that a Symposium on Judicial Campaign Conduct be held to "reexamine [the Canons] to assure that they promote fair elections while safeguarding the right to free speech." That Symposium, chaired by Chief Justice Randall T. Shepard of Indiana and co-hosted by seven other Chief Justices, was held in November 2001; a statement

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[1] The brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No one other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

of recommendations is in process.[2] For the Summit and Symposium, staff services were provided by the National Center for State Courts, which regularly provides such support for the Conference (and other organizations).

In short, a substantial number of the members of the Conference, working through the National Center for State Courts, have been acting together to study and recommend steps to address the complex issues presented by judicial elections.

SUMMARY OF ARGUMENT

The Conference does not take any position on the language of the announce clause of the Minnesota Judicial Canon, or any other Canon. The Conference urges this Court to decide the case in a way that preserves the States' flexibility to balance First Amendment concerns against other constitutional commitments to the Due Process rights of litigants and the independence of the judiciary within a system of separated government powers. Because this Court's decision could affect the conduct of judicial elections in thirty-nine States, the precise contours of its opinion will have national significance.

First, for well over a century, the States have worked to structure judicial elections so that judges could be selected by voters without impairing the traditional role of an independent and impartial judiciary. States adopting elections for the judiciary did so, in fact, to enhance their independence. Moreover, the thirty-nine States that select at least some of their judges by election[3] have implemented an array of

[2] The Symposium papers will appear in 77 Ind. L.J. in the Spring of 2002.

[3] In seven States, no judges face elections; in four, probate judges are elected (Connecticut, Maine, South Carolina and Vermont). Hereafter, we put aside those eleven States and address the thirty-nine others. *See* our Appendix and A.B.A. Rep. & Recommendations of the Task Force on Lawyers' Political Contributions (pt. 2) app. 2 at 69-76 (1998) (hereinafter "ABA Task Force Report") for a listing of the thirty-nine States with

measures, through constitutional provisions, codes of conduct and otherwise, designed specifically to preserve for the judiciary its traditional role even as judges are required to stand for election. Contrary to the suggestion of other *amici*, the choice before the States has not been one between elections conducted like all others, without reasonable and meaningful limits, or no elections at all. History shows that having adopted elections, States are unlikely to eliminate them, but pursue instead "innovation and experimentation," *see Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), in balancing the competing constitutional values. The States' historic commitment to this balance merits careful consideration from this Court.

Second, the right the Due Process Clause provides litigants to unbiased, impartial, open-minded judges, both as a matter of fact and as a matter of perception, must be carefully weighed along with the First Amendment rights presented in this case. *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059 (Summer 1996). While some lower courts have referred to impartiality as a compelling state interest, few explicitly recognize the constitutional dimension of the interest embodied within the Due Process Clause, and most simply ignore it. Petitioners and some *amici* acknowledge the constitutional nature of the state interest but suggest that the Due Process Clause is violated only when a judge should

elections. Nationally, 86.9% of state judges face elections of some type; 53% of appellate judges and 77.3% of trial judges (general jurisdiction) face contestable elections. *Id.* at 3 n.1 (based on 1998 and 1996 sources).

Our Appendix, based on the ABA Task Force Report, *supra*, app. 1, shows just which States have what system(s). This shows that: among the thirty-nine States, nineteen have retention elections (in seven, for all judges). Contestable elections occur in thirty-three States: twenty have nonpartisan elections (in twelve, for all judges), and sixteen have partisan elections (in seven, for all judges); three of those States have both nonpartisan and partisan elections (Idaho, Indiana and North Carolina).

have stepped aside, but did not, in a specific case based on particular statements made during a campaign. This suggestion, however, is underinclusive as some judicial speech may violate the State's interest in an impartial judiciary even if it does not violate a particular litigant's due process rights. In contrast, the States should be permitted to focus on preventing disqualification problems in the first instance. The Conference urges that this Court focus on the perspective of the States in structuring their judicial systems in deciding the case.

Third, the issue in this case presents squarely the role of judicial independence within state constitutional provisions for the separation of governmental powers as well as checks and balances. Only an independent judiciary, unencumbered by commitments to popular majorities, is able to discharge its historic constitutional obligations, including review of legislative actions produced by those same majorities. As this Court has recognized the "fundamental tension" between the requirements of an independent judiciary and the demands of electoral politics, *see Chisom v. Roemer*, 501 U.S. 380, 400 (1991), so have the States acknowledged this tension and the differences between the work of legislators and the work of judges that underlies it. By enacting reasonable limits on judicial campaign conduct and speech, States have sought to strike a balance among the different constitutional pressures at work within a judicial elective process. The need for such limits has become increasingly evident under the "realities" of modern judicial campaigns,[4] as judicial candidates come

[4] *See Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 477 (2001); Anthony Champagne, *Television Ads in Judicial Campaigns*, 77 Ind. L.J. (forthcoming 2002) (presented at November 2001 Symposium on Judicial Campaign Conduct and the First Amendment); Thomas R. Phillips, *Comment on Judicial Independence and Accountability*, 61 Law & Contemp. Probs. 127, 130 (Summer 1998).

under pressure to win office with commitments, express or clearly implied, on the controversial political and legal issues of the day.

ARGUMENT

I. THE STATES HAVE HISTORICALLY IMPLEMENTED A VARIETY OF MEASURES TO PROVIDE FOR JUDICIAL ELECTIONS WHILE PRESERVING THE DISTINCTIVE ROLE OF THE JUDICIARY.

This Court has recognized "a fundamental tension between the ideal character of the judicial office and the real world of electoral politics," *Chisom v. Roemer*, 501 U.S. 380, 400 (1991), and the States, while choosing to hold judicial elections, have been mindful of that tension. They have striven consistently and with care to balance judicial accountability with judicial independence and impartiality. The Conference urges this Court to bear in mind the impact its decision will have on the States' historic efforts to handle the unique challenges state judicial elections present.

Between 1846 and 1860, twenty-one States had constitutional conventions, nineteen of which chose elections, with only Massachusetts and New Hampshire holding out.[5] It is not correct that the choice of elections was "an unthinking 'emotional response' rooted in . . . Jacksonian Democracy" which somehow "assumed that popular election of judges constituted a radical measure intended to break judicial power through an infusion of popular will and majority control." Kermit L. Hall, *The Judiciary on Trial: State Constitutional*

[5] By 1860, twenty-one of our thirty States elected judges. See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 44 Historian 337 (1983) for a discussion of the history of judicial elections. *See also* Caleb Nelson, *A Re-evaluation of Scholarly Explanation for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 191 (1993).

Reform and the Rise of an Elected Judiciary, 1846-1860, 44 Historian 337, 338-39 (1983). On the contrary, the move to judicial elections was led by moderate lawyer-delegates to increase judicial independence and stature. Their goal was a judiciary "free from the corrosive effects of politics and able to restrain legislative power." *Id.*

Moderate reformers built consensus among delegates by adopting constitutional devices designed to limit the potentially disruptive consequences of popular election. *Id.* at 342, 352. For example, provisions rendering judges ineligible to run for other offices while serving on the bench were intended to prevent the political use of judicial office to win other offices. Staggered terms for appellate judges were aimed at averting sweeping changes in the composition of the courts resulting from increased "party feeling" in a particular election. These measures and others, such as longer terms and "retention" elections, served the goal of restricting the "impact of party and majority rule." *Id.* at 352.

The constitutions of the thirty-nine States in which judges face elections of some type have an array of such provisions, unique to the judiciary, to accommodate the choice of popular selection with the constitutional value of judicial independence. *See, e.g.*, P. App. 37a n.18. Most would be unthinkable for other elected officials in the legislative and executive branches. In all thirty-nine States (except Nebraska), judges' terms are longer than any other elective officials'.[6] In thirty-

[6] *See, e.g.*, Ariz. Const. art. 6, § 4; Cal. Const. art. 6, § 16; Ga. Const. art. 6, § 7 ¶ I; Ill. Const. art. 6, § 10; Mich. Const. art. VI, § 2; Minn. Const. art. 6, § 7; N.Y. Const. art. 6, § 2; Ohio Const. art. IV, § 6; Tex. Const. art. 5, § 2. Here and in notes 6-10, all citations are to constitutional provisions; no statutory provisions are included.

Of appellate judges who face elections, 38.5% have terms of ten to fifteen years and another 60.6% have six to eight year terms. Of trial judges who face elections, 13% have terms of ten to fifteen years, and another 67.6% have six to eight year terms. Citizens for Independent Courts, *Uncertain Justice: Report of the Citizens for Independent Courts Task Force on Selecting State Court Judges* 77, 90-92, 116-17 (2000).

seven of these States, only judges are subject to both impeachment and special disciplinary process.[7] In thirty-three, judges are the only elective state officials subject to requirements of training and/or experience (except that in ten of those, the attorney general is subject to similar requirements).[8] In twenty-three, only judges are subject to mandatory age retirement.[9] In twenty-one, only judicial nominations go through nominating commissions; in six States, this applies even to interim appointments.[10] Last, in eighteen States, only judges cannot run for a nonjudicial office without first resigning.[11]

This pattern shows that the choice of elections, "while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly." *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991). The thirty-nine States have recognized that, far from fulfilling the historic purpose in allowing for the popular election of

[7] *E.g.*, Ariz. Const. art. 6.1, § 3; Cal. Const. art. 6, § 18(d); Ga. Const. art. 6, § 7 ¶ VI; Ill. Const. art. 6, § 15(b); Mich. Const. art. VI, § 30; Minn. Const. art. 6, § 9; N.Y. Const. art. 6, § 22; Ohio Const. art. VI, § 17; Tex. Const. art. 5, § 1-a.

[8] *E.g.*, Ariz. Const. art. 6, § 6; Cal. Const. art. 6, § 15; Ga. Const. art. 6, § 7 ¶ II; Ill. Const. art. 6, § 11; Minn. Const. art. 6, § 5; N.Y. Const. art. 6, § 20; Tex. Const. art. 5, § 2.

[9] *E.g.*, Ariz. Const. art. 6, § 39; Cal. Const. art. 6, § 20; Ill. Const. art. 6, § 15(a); N.Y. Const. art. 6, § 25; Ohio Const. art. IV, § 6(c); Tex. Const. art. 5, § 1-a(1).

[10] *E.g.*, Ariz. Const. art. 6, § 37; Cal. Const. art. 6, § 7; Ky. Const. art. III, § 118(2) (with interim appointments included); N.M. Const. art. VI, § 35 (with interim appointments included); N.Y. Const. art. 6, § 2(c).

[11] *E.g.*, Ariz. Const. art. 6, § 28; Cal. Const. art. 6, § 17; Ill. Const. art. 6, § 13(b); Mich. Const. art. VI, § 21; Minn. Const. art. 6, § 6; N.Y. Const. art. 6, § 20(b)(1); Ohio Const. art. IV, § 6(b).

judges, any effort to treat judicial elections like others wholly undermines the judiciaries' independent role under their constitutions. Their balanced approach to the proper structure for an elected judiciary embodies the understanding that

> the word "representative" connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense. . . . [T]he judge represents the Law—which often requires him to rule against the People.

Chisom, 501 U.S. at 410-11 (Scalia, J., dissenting).

Contrary to the suggestion of one petitioner and one of the *amici*, *see* Pet'r Republican Party of Minnesota Br. at 38-39; Idaho Conservation League and Louisiana Environmental Action Network Br. at 7-23, this case does not present the Court with a choice between forcing States to conduct judicial elections like all other elections, and prohibiting judicial elections altogether. The voters in these States have generally rejected efforts to dismantle judicial elections, choosing to maintain in place judicial election processes which have historically included safeguards to protect the traditional role of the judiciary.[12] There is no support for the proposition that the electorate has viewed the choice as one between legislative-type elections or no elections at all. Any

[12] In 1906, when Roscoe Pound gave a landmark address to the ABA, roughly fourteen percent of our state judges faced no elections. Roy A. Schotland, *Summit on Improving Judicial Selection: Personal Views*, 34 Loy. L.A. L. Rev. 1361, 1367 (2001). Today that number stands at thirteen percent. *Id.* A failed attempt to abandon the elective system in Florida exemplifies its resiliency. In 2000, for example, Florida voters faced a ballot proposition to decide whether their trial judges should continue to run in nonpartisan, contestable elections, or should instead be subject to merit appointments with subsequent retention elections. The change was defeated in every circuit and in every county. Roy A. Schotland, *Financing Judicial Elections 2000: Change & Challenge*, 2001 L. Rev. M.S.U.-D.C.L. 1, 37-41 (forthcoming).

suggestion to the contrary assumes, improbably, that voters, by choosing elections, have chosen also to have a judiciary transformed radically in character. For these reasons, States will continue to conduct elections while continuing also to grapple with the challenges those elections present for an independent and impartial judiciary.

II. DUE PROCESS REQUIRES JUDGES WHO WILL "HOLD THE BALANCE NICE, CLEAR AND TRUE."[13]

Petitioners agree with the Eighth Circuit's conclusion that "a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order." Pet'r Republican Party of Minnesota Br. at 4 (citing P. App. 21a). They acknowledge "the due process clause of the United States Constitution sets the floor." *Id.* at 18. "Due process," they admit, "requires trial before an unbiased judge." *Id.* (citation omitted). The Conference concurs.

Petitioners and some of their *amici* suggest, however, that the due process analysis should only be considered on a case-by-case basis, involving the standards and process of disqualification. *Id.* at 19-21; American Civil Liberties Union Br. at 16-18; Public Citizen Br. at 6-7. Yet, if a judge steps down from any case involving a campaign promise, the voters do not get what they believe they were promised. Petitioners' retrospective approach further imposes on litigants burdens and risks, and imposes on the judicial system both avoidable litigation and the potential loss of many judges' services. In contrast, States with judicial elections sensibly choose to structure those elections to protect guarantees under the Due Process Clause for all litigants rather than subjecting litigants to the burdens and inefficiencies of post-election disquali-

[13] *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

fication or recusal [14] procedures. In short, disqualification is inadequate because it does not protect the State's interest in an impartial judiciary, an interest that parallels but is separate from the interests of particular litigants.

At stake in this case is how much flexibility the States and their supreme courts (judges regulating other judges) will have in regulating their own judges. This Court has recognized that there "could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978). The Due Process Clause's guarantee of impartial judges, both as a matter of fact and as a matter of perception, is a compelling state interest. The dissent in the Eighth Circuit (and other lower courts and some *amici*) overlooked the due process rights to a fair trial before an impartial tribunal as a compelling state interest. P. App. 92a-93a ("must give way before rights which, *unlike the court's policy*, have been constitutionally secured") (emphasis added).

A. States Must Have Latitude to Address the Serious Due Process Issues Presented by Judicial Candidate Speech, and Cannot Rely on Disqualification Procedures Alone.

This Court has repeatedly recognized that judicial bias, or even the appearance of bias, violates the Due Process Clause. *Concrete Pipe & Products v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'" (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (Due Process Clause

[14] While traditionally "disqualification" was involuntary and "recusal" voluntary, in modern practice the terms "are frequently viewed as synonymous and often used interchangeably." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, § 1.1, at 4-5 (Little, Brown & Co. 1996).

violated when judge had "direct, personal, substantial, pecuniary" interest in outcome); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("no person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him"); *Ward*, 409 U.S. at 59-60 (Due Process Clause offended when system tempts "average man as a judge . . . not to hold the balance nice, clear and true" (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927))); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) ("Trial before an 'unbiased judge' is essential to due process" (citing *Bloom v. Illinois*, 391 U.S. 194, 205 (1968); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971))); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. . . . [O]ur system has always endeavored to prevent even the probability of unfairness . . . [even though this may] sometimes bar trial judges who have no actual bias, and who would do their very best to weigh the scale of justice between contending parties."); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice"); *Tumey*, 237 U.S. at 523 (it "violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in this case").

This Court has made clear that the contours of the Due Process Clause in this context "cannot be defined with precision," and that a "reasonable formulation of the issue is whether the 'situation is one which would offer a possible temptation . . . to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Aetna*, 475 U.S. at 825 (citing *Ward*, 409 U.S. at 60). Because the judicial interest "cannot be defined with precision," *id.*, this Court should give latitude to the States and their supreme courts who are attempting to structure court systems to effectively

address the questions of impartiality that imperil the rights of litigants under the Due Process Clause.[15]

While due process is a necessary part of a fair and impartial trial, "it is not a right that lends itself to a fixed or immutable definition." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, § 2.3.2, at 33 & n.13 (Little, Brown & Co. 1996). "Though impartial judges are constitutionally mandated and the due process clause sets a standard for judicial impartiality below which no judge is constitutionally permitted to fall, judicial disqualifications are rarely made on due process grounds." *Id.* § 2.3.3, at 33-34 & n. 17 (citing, *inter alia*, *Aetna*, 475 U.S. at 820). States may, of course, impose more rigorous judicial disqualification standards than due process requires. *Id.* at 34 & n.19 (citing, *inter alia*, *Aetna*, 475 U.S. at 828; *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948); *Tumey*, 273 U.S. at 523). Such efforts are "to promote public confidence in the integrity of the judicial process." *Id.* at 36 & n.19 (citing, *inter alia*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988)). The public confidence in the impartiality of judges has constitutional dimensions, *id.* at 36 n. 34 (citing *Liljeberg*, 486 U.S. at 865 n.12), not addressed by Petitioners.

Disqualification procedures are insufficient. *See* Shepard, *supra*, at 1082. Recusal does not help the litigant who is unaware of the judge's statements, and often the litigant bears the expensive and time-consuming burden of raising and litigating the question of recusal. Recusal also imposes costs

[15] For example, since 1995 Ohio has taken official steps to promote constructive judicial campaigns and reduce the likelihood of problematic conduct. *See* Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 Loy. L.A. L. Rev. 1447, 1456-57, 1460-61, 1463-64 (2001). All judicial candidates must attend a special course early in the campaign year, and special panels of judges and an expedited hearing process are in place to deal with problematic conduct if it occurs. *See id.*

and delays on the public and other litigants as cases are shuffled from court to court. Moreover, recusal does not serve the voters who elected a judge based on her stated views. Finally, a reliance on recusal would permit a judicial candidate to offer up whatever view seemed to get the most votes or the most contributions, with full knowledge that the candidate would never have to stand by it as a judge. Impartiality is thus secured only by a form of electoral fraud, which could entail also ethical violations for deliberate misrepresentations in the course of a campaign.

Courts facing disqualification issues presented in this context are generally reluctant to probe into election-related influence or motivation. *See, e.g., Nevius v. Warden*, 960 P.2d 805, 810 (Nev. 1998) (Springer, C.J., dissenting) ("Judges should be judging crime, not 'fighting' crime"); *State v. Kinder*, 942 S.W.2d 313, 321-22 (Mo. 1996) (not willing to disqualify a trial court judge who six days before presiding over a capital trial of a black defendant, and who faced election later that year, issued a press release announcing a decision to switch political parties claiming that his prior party had "place[d] far too much emphasis on . . . people with a skin that's any color but white" and he expressed opposition to "reverse-discrimination quotas and affirmative action"). Precisely to avoid such situations, States have been unwilling to rely on disqualification to address the impact of campaign activity on due process guarantees.

B. Judicial Candidate Speech on Political or Legal Issues Likely to Come Before Courts Carries a High Risk of Improper Prejudgments or Commitments, Whether Express or Implied, in Violation of Due Process Guarantees.

When a judicial candidate speaks out on disputed legal or political issues that may come before him, the electorate reasonably uses those statements to form expectations about the treatment of issues likely to come before that judge.

There is, in fact, no other reason why a judicial candidate would offer such statements in the course of the campaign, nor any other use that voters would make of them. Numerous *amici* acknowledge this point. *See, e.g., Amici Curiae* [Two] State Supreme Court Justices Br. at 23-24; *Amicus Curiae* Chamber of Commerce of the United States Br. at 5-7. As a result, campaign statements about the candidate's views on issues likely to come before the court leave litigants facing a judge who, at worst, is actually biased or who, at best, cannot provide the appearance of impartial justice. Judicial canons limiting campaign conduct attempt to limit the circumstances in which a due process problem of this magnitude could result.

Rejecting a First Amendment challenge to such a Canon, the Third Circuit stated:

> If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to the evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.

Stretton, 944 F.2d at 142.

Even if candidates argue—much less believe in good faith—that they can wipe the slate clean of campaign promises to decide a case, "the requirement of due process . . . is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U.S. at 532. Due process guarantees more than a possibility that a judge would back down from his public statements if convinced to do so. In the current climate of judicial elections, there is a strong influence on a judge to stand by campaign statements on which he staked his hopes of victory—and behind which he would have to stand in seeking reelection. Under the worst

circumstances, such a campaign "promise" is like "a bribe offered to voters, paid with rulings consistent with that promise, in return for continued employment as a judge." Shepard, *supra*, at 1088.

Canons limiting judicial candidate campaign conduct are "straightforward" regulations of expression that do not discriminate in favor of one viewpoint or another. They do not suppress ideas or seek to control political opinions. *See United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973).

A hypothetical campaign promise made in the most literal sense, such as "I will impose the maximum sentence in every drunk driving case," commits the candidate to a result regardless of the applicable laws or the facts presented. The canon protects accused drunk drivers from a predisposed judge, who cannot, by virtue of a campaign promise, fulfill the duty to consider all the relevant sentencing factors, including, for example, the accused's prior record, property damage or personal injury, and the proven blood alcohol level. A judge's failure to consider these factors could warrant reversal and would certainly violate the defendant's due process rights. Shepard, *supra*, at 1093; *see also* Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 77 Ind. L.J. (forthcoming 2002) (presented at November 2001 Symposium on Judicial Campaign Conduct and the First Amendment).

Courts reviewing the efforts of States to limit judicial campaign activity have historically been sensitive to First Amendment rights affected by these limitations. For example, the district court, the Eighth Circuit, and now the Minnesota Supreme Court have construed the announce clause before this Court to apply only to statements displaying a pre-disposition on issues likely to come before the elected judge. *See, e.g.*, P. App. 52a-53a; 128a. The Conference urges this Court to respect the difficult but

essential balance that States have labored to achieve and that lower courts have, by and large, approved, in some instances with the aid of narrowing constructions. P. App. 53a-56a.

Judicial canons limiting statements by judicial candidates that indicate or suggest bias, if applied with proper, limiting construction, lead to the right result: they protect the due process rights of litigants by preventing judicial candidates from acquiring an improper interest in the outcome of litigation, and by preventing the appearance of such an interest. The prevention of actual and apparent judicial bias, recognized by the Eighth Circuit here and by other circuits in *Stretton* and *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993), is the same interest that this Court has protected under the Due Process Clause. The right to an impartial judge, guaranteed by the Due Process Clause, is a compelling governmental interest. The best approach to resolving challenges to canons regulating judicial campaigns is to accommodate as much speech by judicial candidates as the Due Process Clause permits, viewed from the context of States', and their supreme courts', attempts to structure their judicial systems to avoid these difficulties. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) ("this is a case where constitutionally protected interests lie on both sides of the legal equation.").

III. THIS CASE RAISES ISSUES CENTRAL TO STATE EFFORTS TO PROTECT THE INDEPENDENCE AND DISTINCT ROLE OF THE JUDICIARY UNDER STATE CONSTITUTIONAL SCHEMES OF SEPARATED POWERS.

A. The "Basic Principle" of Separated Powers Compels Close Attention to the Effect of Elections on Judicial Independence.

Petitioner Minnesota Republican Party argues that "this case is not about judicial independence." Pet'r Minnesota Republican Party Br. at 8. Moreover, neither Petitioners nor

any *amici* even refer to state constitutional frameworks of separated powers which depend in substantial measure on the protection of that independence. The Conference respectfully suggests, however, that the question before this Court involves in the most fundamental way these profound constitutional concerns.

Certainly the court below correctly appreciated the States' understanding that limitations on judicial campaign conduct and speech, taken together with other constitutional and statutory procedures for the conduct of judicial elections, "are designed in large part to protect the independence of the State's judiciary." *See* P. App. 25a. Attending closely to the requirements of judicial independence, the States have properly kept in view the "basic principle" of separation of powers which compels "allocating specific powers and responsibilities to a branch fitted to the task." *Loving v. United States*, 517 U.S. 748, 757 (1996).

The separation of powers doctrine requires, in practical application, "an analysis of governmental functions," W.B. Gwyn, *The Meaning of the Separation of Powers* 26 (1965), and sensitivity to the maintenance of the checks and balances necessary to protect each branch of the government from "encroachment and aggrandizement" by another. *Mistretta v. United States*, 488 U.S. 361, 381 (1989). No principle has more centrally shaped organization of state governments and in particular the relationships between and among their branches. Rooted in pre-Revolutionary political thought that cast the mold for the federal and state constitutions to follow, *see* Bernard Bailyn, *The Ideological Origins of the American Revolution* 74 (1967), the doctrine of separated powers for the judicial, executive and legislative branches came quickly to define for States "the very characteristic of the American political system." Gordon S. Wood, *The Creation of the*

American Republic 1776-1787 151 (1969). State constitutions throughout the country, like Minnesota's, reflect the centrality of this commitment.[16]

In choosing judicial elections, States have not abandoned their concern with preserving fully separated powers. The States know that if candidates for judicial office appeal for voters' support on the same basis as legislative candidates—if they answer to the same electoral majorities—the courts run the grave risk of becoming second legislatures. As electoral twins to the legislatures, courts would stand to lose the essential independence required for them to discharge their high constitutional duty of judicial review. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. 137, 177 (1803). For this reason, States in the early Republic acted to establish that independence, expecting that the judiciary could only then provide the necessary "check" on legislative excess fueled by popular passion. *See* Wood, *supra*, at 404, 451.[17] Since that time, States—including States with judicial elections—have remained vigilant in protecting that independence, adopting a variety of measures to secure it. *See supra* Part I.

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[16] Thus Article 3, Section 1, of the Minnesota Constitution states that "[T]he powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." Minn. Const. art. 3, § 1 (2000).

[17] James Madison illustrated the general principle a different way, by opposing a proposal that would have facilitated the conduct of constitutional conventions as a means of checking governmental abuse. Madison objected that the proposal would have conferred an undue advantage on the legislature, whose members, skilled in the electoral arts, would have the advantage in seeking election to the constitutions. Because "the same influence which had gained them an election into the legislature would gain them a seat in the convention," the convention could not effectively act as a check on legislative excess. The Federalist No. 49, at 316 (James Madison) (Clinton Rossiter ed.).

Judicial review, unburdened by undue popular pressures, is necessary to assure that a majority "united by a common interest" does not threaten the rights of the minority. The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed.). This Court has recognized, for example, the role of "searching judicial inquiry" where legislation reflects "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of the political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938). This is valued even when popular majorities effect their will directly by referendum or initiative. *See, e.g., Evans v. Romer*, 854 P.2d 1270, 1285 (Colo. 1993) (Constitutional amendment impermissibly "fenced out" from participation in the political process "an independently identifiable group."), *aff'd*, 517 U.S. 620 (1996).

These same concerns apply beyond constitutional judicial review, to routine review of agency action. "Policy arguments," as this Court has made clear, "are more properly addressed to legislators or administrators, not to judges." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 864 (1983). *Chevron* principles hold true for state courts. State courts, like federal courts, must proceed in reviewing agency action with the understanding that "[j]udges are not experts in the field, and are not part of either political branch of the Government," and that the resolution of the issues before them must not depend on "their personal policy preferences." *Chevron*, 467 U.S. at 864. Because judicial candidates, like other candidates, come under pressure to place personal "preferences" front and center before the voters, States impose limits on judicial candidate speech to defend the boundaries of judicial decision-making.

Some *amici* before this Court, stressing the policy-making role of state courts in common law adjudications, *see, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 466 (1952), contend that judges must be free in this circumstance to abandon the

chambers for the hustings, or to rule from the bench with a close eye on the voter. *See Amici Curiae* [Two] State Supreme Court Justices Br. at 4 (A state's adoption of an elective system "suggests that a certain degree of political responsiveness [by elected judges] is not only permissible, but is an intrinsic and expected element of the elective judicial role."). This suggestion is profoundly mistaken. The courts do not engage in common law adjudication as surrogates for the legislature. Legislators attend closely to the will of voters on election day, and to the direct imprecation of interest groups and constituents at all other times. Judges decide the cases before them by presiding over a distinctive adversarial process and making a disciplined use of the tools of their craft to decide impartially based upon the evidence and the applicable law.

The States have sought to protect the judiciary in the performance of its independent function through various constitutional provisions, statutes and rules. *See supra* Part I. The Supreme Court of Minnesota has carefully considered the efforts of that State, concluding that "[w]hile the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they, too, designed a plan to recognize the uniqueness and independence of the state judiciary." *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992), *cert. denied*, 507 U.S. 1033 (1993), *quoted in* P. App. 108a. The design of Minnesota's plan necessarily involved complex choices that the States and the federal government have always faced in preserving the judicial independence within constitutional arrangements of separated powers. *See, e.g.*, Gerhard Casper, *Separating Power* 152 (1997). Yet in Minnesota and elsewhere, there is broad agreement—even among jurists who favor an elective process—that to protect judicial independence, states need "clear and reasonable rules for judicial campaign behavior." *See, e.g.*, Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 1003 (2001).

B. Courts Have Long Recognized the Tension between Independence and Electoral Accountability in Seeking to Preserve the Distinctive Role of the Judiciary.

1. *The Precedents Acknowledge the Unique Issues Elective Systems- Present For the Judiciary.*

This Court has noted the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U.S. at 400. The lower courts, while disagreeing on outcomes, have concurred on the challenge presented by that "fundamental tension." They have agreed in particular about the source of the problem: that the role of the judge is fundamentally different from that of the legislator, and that this fundamental difference shapes the issues raised by their respective candidacies for elective office. This Court has summarily affirmed, for example, a lower court ruling that the Equal Protection Clause of the Constitution does not mandate the application of the "one man, one vote" apportionment doctrine to judicial elections. The lower court in that case specifically concluded that:

> [T]he one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency.

Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972) (citing *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)), *aff'd*, 409 U.S. 1095 (1973).

Other lower courts have unanimously adopted this understanding of the core differences between legislators and judges. *See Buckley*, 997 F.2d at 228 ("Judges remain different from legislators and executive officials, even when

all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."); *Stretton,* 944 F.2d at 142; *Morial v. Judiciary Comm'n,* 565 F.2d 295, 305 (5th Cir. 1977).

Indeed, the differences acknowledged by the courts between the work of legislators and that of judges are vast, bearing directly on the fundamental differences in the "political" responsiveness appropriately expected from them by their "voters" and "constituents." Elected legislators are free to meet—at any time, openly or privately—with their constituents or others affected by their action in pending or future matters who enjoy a guaranteed constitutional right of petition. In contrast, judges are insulated from contact with the parties to a matter before them by both norms and legal restrictions on ex parte contacts.[18] Unlike legislators, judges cannot build support through constituent casework, patronage or securing benefits for their communities. Other elected officials expect and typically face competition, but few judges do.[19] While elected legislators may and do pledge to change law and, if elected, often work reservedly toward change, judges may not. Judges, to the contrary, are expected to approach with restraint issues of great societal or political

[18] *See, e.g.,* Minn. Stat. Ann., Code of Judicial Conduct, Canon (3)(A)(7) (2001); *see also McKenzie v. State*, 583 N.W.2d 744, 748 (Minn. 1998) ("[c]learly a judge may not discuss a trial with one party unless the opposing party is present").

[19] *See, e.g.,* Chief Justice Thomas R. Phillips, Address to the Joint Session of the 73d Legislature of Texas 5 (Feb. 23, 1993) ("[O]ver eighty percent [of Texas's 481 judges sitting in 1993] were unopposed in both the primary and general election when they first sought reelection. . . . [O]f those . . . who initially reached the bench by appointment . . . fifty-five percent have never had an opponent . . . either in a primary or a general election."); *see also* Melinda Gann Hall, *Competition in Judicial Elections, 1980-1995* table 2 at 20 (Sept. 1998) (unpublished paper delivered at 1998 American Political Science Association annual meeting) (stating that forty-eight percent of incumbent justices are not challenged).

import; to this end they employ "devices for disposing of a case while avoiding judgment on the constitutional issues it raises," which include the doctrines of standing, vagueness and ripeness. *See* Alexander Bickel, *The Least Dangerous Branch* 17, 117-18, 143, 150, 169 (Bobbs-Merrill 1957).[20]

The politics of the legislative elective process turns on commitments, unfettered dialogue and responsiveness, and it does not end with election, but continues beyond, in the day-to-day conduct of legislative office. The politician who won the election is a politician still afterward, free to cultivate and reward support by working with his supporters to advance shared objectives. And because elected officials act in ways that may directly affect large numbers of people, those affected may, in turn, resort to political safeguards. *See Minn. State Bd. v. Knight*, 465 U.S. 271, 283-87 (1984). But a judge, once elected, must behave as a judge—acting, as an arbiter, neutrally toward the identifiable and limited number of parties in each case. Those parties, typically the only ones affected by the judge's actions, have no safeguard except the judge's commitment to taking action only on the facts and the law.

It is in light of these differences that the role of the judge-as-political-candidate presents challenges for both the candidate and the State seeking to preserve the essential attributes of the judiciary. Petitioner Minnesota Republican Party concedes that, as the Eighth Circuit below stated the case, "it is consistent with the essential nature of campaigns for

[20] Blackstone's comments on equity–the correction of deficiencies in the law–explain the philosophical underpinnings of the idea:

> [T]he liberty of considering all cases in an equitable light must not be indulged too far, least thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. . . . [E]quity without law . . . would make every judge a legislator, and introduce most infinite confusion.

George Sharswood, ed., *Blackstone's Commentaries on the Laws of England* 60 (Childs & Peterson 1860).

legislative and executive offices for candidates to detail and make promises about the programs that they intend to enact into law and to administer." Pet'r Minnesota Republican Party Br. at 34 (citing P. App. 44a).

As a result, the conscientious judge has no choice but to take care with campaign speech, being wary of even implying promises or commitments. Failure to do so would visit, in effect, either a fraud on the voters or a fraud on the office. The successful candidate, recognizing that a commitment has been made or perceived, cannot act on it without violating the obligation to rule without prejudice or commitment. Alternatively, the candidate may disregard the commitment, or the perception of it, leading the voters to conclude that they have been deceived.

States have responded to this dilemma with carefully drawn limitations on speech, but also with other measures intended to mitigate the effects of campaigning on judicial independence. All but four States with judicial elections bar personal fundraising and require that all fundraising be done by the candidate's campaign committee, in order to at least reduce the candidate's involvement in fundraising.[21] At least twenty-four States limit the time period during which fundraising is permitted, both before and after the election.[22] ABA Task Force Report, *supra*, at pt. 2, 47-48.

Recognizing the fundamental differences between judges and other officials that lie behind state limits on judicial candidate speech and conduct, the courts have grappled with the formulation of the appropriate constitutional standard. The court below adopted a narrowly tailored/compelling interest

[21] The four states are California, Texas, Idaho and Nevada. *See* ABA Task Force Report, *supra*, at 40-41 n.73.

[22] The pre-election window is one year in five states and shorter in eleven states, and the post-election window is six months or shorter in nineteen states. *Id.* at 48 n.2.

test. *See* P. App. 20a. Other courts, following this Court's analysis of Hatch Act prohibitions on public employees, *see Letter Carriers*, 413 U.S. 548, have adopted versions of the less stringent test articulated in that case. *See, e.g., Stretton*, 944 F.2d at 141 (construing the balance called for in *Letter Carriers* to require narrow tailoring to a compelling interest); *Morial*, 565 F.2d at 300 (interpreting *Letter Carriers* to require a "reasonable necessity ... to achieve a compelling public objective"); *see also Buckley*, 997 F.2d at 227-30 (stating no rule, but balancing the interests of the State and the candidates and examining the rule's fit to the State's interest).[23] Still another line of authority suggests that a lesser degree of scrutiny is appropriate when the speech in question implicates the fair administration of justice. *See Gentile v. State Bar*, 501 U.S. 1030, 1057 (1991); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring) ("As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will ... obstruct the fair administration of justice."); *Bridges v. California*, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting) ("[J]udges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.").

The courts employing various constitutional tests are doing so, however, on the basis of a common conviction—that the judiciary's role is distinctive, and that it calls for special

[23] Subsequent cases have interpreted *Letter Carriers* in differing ways. Some, including *Snepp v. United States*, 444 U.S. 507, 509 n. 3 (1980), and *Brown v. Glines*, 444 U.S. 348, 355 (1980), suggest that the appropriate test is one requiring the restriction to be a reasonable means to protect a substantial state interest.

protections when judges become candidates for elective office. They agree also that reconciling electoral accountability with the judiciary's unique function, while a difficult task, is essential. *See, e.g., Buckley*, 997 F.2d at 227 ("only a fanatic would suppose that one of the principles should give way completely to the other"); *Morial*, 565 F.2d at 300 n.5 (noting that First Amendment candidacy jurisprudence is "difficult"); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990). At stake is the quality and principled administration of justice by state courts whose members, though required to stand for election, would remain faithful still to what this Court has termed "the ideal character of the judicial office." *Chisom*, 501 U.S. at 400.

2. *Any Standard for Judging Permissible Candidate Speech Must Take into Account the "Political Realities" of Modern Campaigns.*

In at least a few States, judicial elections in recent years have come increasingly to resemble legislative and executive contests in cost, intensity and style. *See* ABA Task Force Report, *supra*, at 13 n.25 ("The changes in judicial elections have been summed up as making them 'nastier, noisier and costlier.'" (citing Richard Woodbury, *Is Texas Justice for Sale?: The State's Top Judge Resigns to Fight for Reform*, Time, Jan. 11, 1988, at 74)); *see also* R. Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907-1998*, 26 Okla. City U.L. Rev. 519, 519 (Summer 2001). Any rule or standard fashioned to distinguish permissible from impermissible candidate campaign speech needs to take into account "political realities" in this sphere, as this Court has counseled in other cases involving campaign speech and activity. *See, e.g., Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 477 (2001).

It is error to believe that campaign speech, like other speech, depends for its effectiveness on "spelling out" the intentions of the speaker. Much to the contrary, political tactics often favor

the concise, coded expressions that stop considerably short of full exposition. *See, e.g.,* Kathleen Hall Jameson, *Dirty Politics: Deception, Distraction and Democracy* 85 (1992) (noting common use of "code words, images, voices, or tones" used to "telegraph" a message). Political speech is frequently, and quite deliberately, suggestive rather than explicit, often cast into abbreviated "soundbite" form; and "a more sophisticated mixture of candidate-centered advocacy peppered with ambiguous issue references has long proved the most effective advertising strategy." David A. Pepper, *Recasting the Issue Ad: The Failure of the Court's Issue Advocacy Standards*, 100 W. Va. L. Rev. 141, 158 (1997).

One cause for the continued controversy over the announce clause is that while the constitutional issues are apparent, so are the means by which such "announcements" on "general issues" provide, in the medium of political speech, ample room for the communication of commitments. It matters less how many words are used, and how precisely, and more what is intended by the speaker and fully understood by the audience. This attention to intention and to context may not pass muster with courts in cases involving legislative campaign finance, *see, e.g., Fed. Election Comm'n v. Christian Action Network*, 894 F. Supp. 946, 957-58 (W.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 19047 (4th Cir. Aug. 2, 1996), but it is vital in understanding the challenges of judicial campaigning for an independent, impartial judiciary.

As the Court resolves the issue presented in this case, it is urged to do so with careful attention to the difficulties presented by candidate campaign speech—even on "issues"—for an independent and impartial judiciary. In their efforts to address this problem, the States are addressing a real and urgent one of

separating out informative speech from the kind, no less typical of campaigns, intended to communicate commitments.[24]

3. *The Court's Increased Role in the Adjudication of Prominent Issues Also Before the Legislature and Executive Justifies Clear and Reasonable Regulations of Judicial Campaign Speech.*

The issue before this Court arises at a time in the country's history when state and federal courts consider the widest range of controversial issues in American politics and society. *See, e.g., Morial*, 565 F.2d at 302 ("Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues."); *Buckley*, 997 F.2d at 229 ("There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."). These same issues—reproductive rights, gun control, the regulation of tobacco, affirmative action, and others—also occupy center-stage in the political process and in the legislatures. *See, e.g., Sampson v. State*, 31 P.3d 88, 98 (Alaska 2001) (rejecting a claim that the Alaska Constitution implies a right to physician-assisted suicide); *Hilly v. Portland*, 582 A.2d 1213, 1215 (Me. 1990) (reviewing the constitutionality of a statute requiring a permit for the carrying of a concealed weapon); *Pro-Choice Miss. v. Fordice*, 716 So.2d 645, 649 (Miss. 1998) (reviewing a claim that certain statutory restrictions on abortion are unconstitutional);

[24] It is not correct that attempts to limit commitments are necessarily frustrated—or rendered fatally inconsistent—by the right of "judges or prospective judges" to take positions in "judicial opinions, legal briefs or arguments, law review articles, op-ed pieces, books, or speeches that predate the declaration of candidacy." Public Citizen Br. at 13. There is little danger that legal scholarship will be confused with campaign statements, that the two will have similar effects on potential voters, or even that the audience for the one is the same as for the other.

Baker v. State, 744 A.2d 864, 886 (Vt. 2000) (asserting that the Vermont Constitution mandates extension of state marriage laws to same-sex couples).

An elected court in particular must avoid the perception or the possibility that its members, having campaigned on such issues, may be pressed to act more like elected legislators than judges in resolving them. Here the danger is not, as previously discussed, that courts will be unable to check the legislature, but that they will be unable, under the pressures of the campaign trail, to check themselves, and will intrude into the prerogatives and methods of the other branches.

This check can be accomplished only by judges who review and decide their cases as judges—by using the tools of their craft. Those include an unrelenting focus on the facts and the law, and the conduct of careful legal analysis presented clearly and with integrity in opinions and orders. Justice Cardozo, who was elected with party endorsement to judicial office in New York, expressed the nature of the judicial function in these terms:

> [A]n important distinction separates . . . judicial from legislative activity. . . . [T]he judge . . . ought, in adherence to the spirit of our modern organization, and in order to escape the dangers of arbitrary action, to disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.

Benjamin Cardozo, *The Nature of the Judicial Process* 120-121 (1921).

Full engagement with the electorate as a political candidate necessarily places severe strains on fidelity to these principles. Yet these are the core principles which define—and limit—the participation of judges in the controversial issues of the day.

CONCLUSION

Amicus curiae, Conference of Chief Justices, respectfully requests that this Court affirm the decision of the Eighth Circuit insofar as it acknowledges the constitutional basis for allowing States, when considering limits on judicial candidate speech, to balance First Amendment concerns against the guarantees of the Due Process Clause and the role of an independent judiciary under our constitutional scheme of separated powers.

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February 19, 2001

APPENDIX

STATES AND THE TYPES OF JUDICIAL ELECTIONS FOR SOME OR ALL OF THEIR JUDGES (Underlined states have different judges facing different types of elections.)

PARTISAN*	RETENTION**	NON-PARTISAN	NO JUDICIAL ELECTIONS***
Alabama	Alaska	Arkansas	Connecticut
Idaho	Arizona	Arizona	Delaware
Illinois	California	California	Hawaii
Indiana	Colorado	Florida	Massachusetts
Kansas	Florida	Georgia	Maine
Louisiana	Illinois	Idaho	New Hampshire
Michigan	Indiana	Indiana	New Jersey
Missouri	Iowa	Kentucky	Rhode Island
New Mexico	Kansas	Maryland	South Carolina
New York	Maryland	Minnesota	Vermont
North Carolina	Missouri	Mississippi	Virginia
Ohio	Nebraska	Montana	
Pennsylvania	New Mexico	Nevada	
Tennessee	Oklahoma	North Carolina	
Texas	Pennsylvania	North Dakota	
West Virginia	South Dakota	Oklahoma	
	Tennessee	Oregon	
	Utah	South Dakota	
	Wyoming	Washington	
		Wisconsin	

* In Michigan and Ohio (and recently for the Idaho Supreme Court) judicial candidates appear on the general election ballot without party labels, but their selection and campaigns are otherwise partisan.

** In Illinois, New Mexico, and Pennsylvania judges are initially elected in partisan elections, but their continuance is determined in retention elections; New Mexico has a uniquely hybrid process.

*** Included here are Connecticut, Maine, South Carolina and Vermont, which elect probate judges. Except for this note, this Table includes only appellate and general-jurisdiction trial judges.

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v.

VERNA KELLY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than ten thousand members nationwide and twenty-eight thousand affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate

[1] This brief was authored in its entirety by undersigned counsel for amicus curiae. No person or entity, other than the named amicus curiae and their counsel and members, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the fair and proper administration of justice.

Consistent with these objectives, NACDL supports reasonable State efforts to regulate statements by sitting judges and candidates for judicial office announcing how they would rule in cases likely to come before them. NACDL has a particular interest in the conduct of judicial elections, because judicial candidates too often run for election on promises to be tough on criminal defendants, and run for reelection based on how they have followed through on those promises. NACDL has long been concerned that such campaign promises are inconsistent with the judicial role and make it more difficult for criminal defendants to receive fair trials. NACDL submits this brief to demonstrate that States have compelling interests supporting reasonable measures, such as Minnesota's Canon 5(A)(3)(d)(i), that prevent judicial candidates from making campaign commitments that can actually skew the administration of justice against unpopular litigants like criminal defendants or at a minimum create the appearance of prejudice and bias.

SUMMARY OF ARGUMENT

This is not a case about regulating the speech of candidates for *political* office. Judges – including elected judges – belong to an institution that is fundamentally *apolitical* and that depends for its very legitimacy on remaining at all times scrupulously impartial. Whereas officials in the political branches of government are quite properly elected on the basis of promises to effectuate policy commitments, and are

expected while in office to take the opinions of voters into account when making their decisions, basic notions of due process and the nature of the judicial role bar judges from doing the same. While deciding cases, judges must be independent of external political forces and must base their actions only on the law and the evidence before them. It is an emphatic first principle that judges' loyalty is owed *not* to those who selected them, but to the law itself.

Minnesota does not somehow forfeit its interests in maintaining an impartial and apolitical judiciary when it decides to elect its judges. On the contrary, the principles of due process do not change, and neither does the judge's basic obligation of fealty to the law. Thus, Minnesota has adopted a number of special safeguards in connection with judicial elections — not least of which is Canon 5(A)(3)(d)(i) itself — that draw a clear distinction based upon the special nature of the judicial role between elections for judicial office and elections for political office, and that demonstrate the State's intent to preserve judicial independence within the context of an elected system. Far from relinquishing its interest in avoiding judicial prejudice or the appearance of prejudice, Minnesota's decision to elect its judges makes its need for safeguards more acute.

Canon 5(A)(3)(d)(i) has been narrowly construed by the Minnesota Supreme Court to restrict judges only from making known how they would decide issues likely to come before them as judges. The State of Minnesota has at least three compelling interests that justify regulating this limited class of speech by judges and judicial candidates. First, Minnesota has a compelling interest in protecting the actual integrity of the judiciary. Second, Minnesota has a compelling interest in avoiding even the *appearance* of judicial prejudice and bias. Finally, given that court decisions can be (and regularly are) challenged on grounds of judicial prejudice, Minnesota has a compelling interest in avoiding the costs of litigating allegations of bias and protecting the final-

ity of its judgments. The best evidence that these concerns are real and not hypothetical are examples of actual campaign statements candidates have made in recent judicial elections — as well as statements made by sitting judges up for re-election touting how they have actually followed through on their earlier campaign promises while on the bench.

ARGUMENT

I. JUDGES ARE FUNDAMENTALLY DIFFERENT FROM POLITICAL OFFICIALS, AND JUDICIAL ELECTIONS ARE FUNDAMENTALLY DIFFERENT FROM ELECTIONS FOR POLITICAL OFFICE.

Unlike other public officials, judges — whether elected or selected — play a non-political role in our system of government. An independent and impartial judiciary is the cornerstone of *every* State's system of justice. Basic principles of due process require that judges decide the cases before them on the law and the merits, not on the basis of campaign or nomination promises or their notion of the contemporary popular will. Contrary to the suggestions of Petitioners and their *amici*, by deciding to elect its judges, a State does not somehow forfeit its interest in preventing judges from prejudging the cases they will hear, nor make a choice to sacrifice its judges' day-to-day independence in favor of political accountability. Minnesota's own laws demonstrate a commitment to regulating the conduct of judicial elections precisely because they seek to preserve the proper administration of justice and the fundamentally apolitical nature of the judicial role.

A. Judges, Even Elected Ones, Do Not Hold "Political" Office.

Petitioners and their *amici* place great reliance on this Court's cases considering the regulation of speech in the con-

text of elections for *legislative and executive* office. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding state law prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of entrance to polling place); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down State early filing deadline for office of President of the United States); *Brown v. Hartlage*, 456 U.S. 45 (1982) (striking down restriction on campaign pledges by county commissioner); *Buckley v. Valeo*, 424 U.S. 1 (1976) (assessing constitutionality of Federal Election Campaign Act applicable to candidates for federal elective office). Indeed, "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for *political* office." *Eu v. San Francisco County Democratic Cen. Comm.*, 489 U.S. 214, 223 (1989) (internal quotations and citation omitted) (emphasis added) (invalidating restrictions regulating the official governing bodies of political parties). Yet judges — whether elected or appointed — do not hold "political" office. Put most simply, "judges are not politicians," *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 953 (D.C. Cir. 1984), nor should they be.

Whereas we expect the legislative and executive branches of government to remain responsive to the views and preferences of those who elected them, there is a "long-standing Anglo-American tradition of an independent Judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). Unlike political officials, who serve voters by carrying out their wishes, the responsibility of a judge is to decide each case based on the law and the rights of the litigants before them, including every litigant's fundamental constitutional right to a fair and unbiased proceeding. *See Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (Due Process Clause entitles all litigants to an adjudication before a judge "with no actual bias against the defendant or interest in the outcome of his particular case"); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of

due process.").[2] State judges — including elected ones — owe their primary loyalty to the law, and to their "solemn responsibility . . . to guard, enforce, and protect every right secured by the Constitution of the United States." *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1973) (internal quotation marks omitted).

This "solemn responsibility" requires judges in the conduct of their office to stand apart from the political majority. Judicial decisions often carry significant public consequences, and the work of judges can therefore elicit strong public responses. While political officeholders typically can, should, and do consider the wishes of the public in their decisionmaking, judges are required to disregard such considerations in all instances. "[I]t is the business of judges to be indifferent to popularity." *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991) (quoting Stevens, The Office of an Office, Chicago Bar Rec. 276, 281 (1974)). "[T]he judge is often called upon to disregard, or even defy, popular sentiment," *id.* at 400, by making decisions that are at once unpopular and compelled by law. *See id.* at 410-11 (Scalia, J., dissenting) ("[I]t is the prosecutor who represents 'the People'; the Judge represents the Law — which often requires him to rule against the People."). This principle may fairly be characterized as the bulwark of our constitutional system. *See, e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not."); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that a conviction for burning an American flag violates the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (protecting free-speech rights of Ku Klux Klan); *United States v. Brown*, 381 U.S. 437, 445 (1965) (function of independent judiciary is to protect civil rights of unpopular persons from "popular clamor" – rights that are not likely to be as well-protected by political branches); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) (First Amendment protects both popular and unpopular viewpoints). Without it, only the popular or the politically correct would enjoy the secure protection of the law.

Democracy is enhanced when politicians announce their positions on the issues they will face in office and promise the public to act in certain ways; in the political sphere, "[c]andidate commitments enhance the accountability of government officials to the people whom they represent." *Brown v. Hartlage*, 456 U.S. at 55. But the very same behavior would be not only wholly improper but also disastrous for judges, compromising their core duty to consider every litigant's case on its own merits, and reducing the chances they will stand against the political majority when required.[3] As the Chief Justice has said, for a candidate for judicial office "to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (Rehnquist, J., mem.). Thus, the normal pressures of political office are fundamentally incompatible with the judge's overriding constitutional duty of impartiality. *See, e.g.*, *Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion) (upholding Texas statute requiring State judges to resign from the bench before running for elective office because State may legitimately prohibit them from exposing themselves to pressures inconsistent with judicial oaths); *cf. Harris v. Alabama*, 513 U.S. 504, 519-20 (1995) (Stevens, J.,

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2 *See also Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion) (although "it is to be expected that a legislator will vote with due regard to the views of his constituents," it "is a serious accusation to charge a judicial officer with making a politically motivated decision").

3 *Amici* supporting the petitioners concede as much. *See* ACLU Br. at 10 n.6 (acknowledging that precommitment is "incompatible with the judicial function" even as it is not incompatible with the legislative function).

dissenting) ("The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office — or who merely wish to remain judges — must constantly profess their fealty to the death penalty.") (footnote omitted).

In short, the institutional role of the judge is fundamentally different from that of the legislative or executive official, and the give and take of policy commitments and promises that are the grist of campaigns for *political* office is at base inconsistent with the judge's fundamental duties of independence and impartiality. For that reason, the campaign speech of a judge or a judicial candidate may threaten compelling state interests where the same speech by a political candidate would not. As Justice Frankfurter wrote, "Judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions." *Bridges v. California*, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting).

B. Minnesota Has Not Forfeited Its Interest in Judicial Independence and Impartiality by Deciding to Elect Its Judges.

Petitioners and their supporting *amici* do not dispute the importance of judicial impartiality or independence, nor could they. Instead, they suggest that once a State makes the choice to elect its judges, its interest in judicial independence ceases to be sufficiently compelling to justify restraints on candidates' pronouncements on issues they are likely to face.[4] However a State selects its judges, its interest in an

[4] *See, e.g.*, ACLU Br. at 6 ("There is no 'judicial candidate' exception to the First Amendment.").

independent, impartial, and apolitical judicial system is fundamental. States that elect their judges properly expect those judges to perform their day-to-day duties with the same level of impartiality and professionalism as judges in other States. Indeed, were it otherwise, election of judges might itself present serious constitutional difficulties. This Court has never suggested that the Due Process Clause's guarantee of a "fair trial in a fair tribunal" turns on whether the judicial tribunal in question is elected or selected. *Cf. Steffel*, 415 U.S. at 460-61 (observing that state judges have responsibility to enforce all federal constitutional rights). On the contrary, an elected judge's duties are identical to those of an appointed judge. *See, e.g., Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when they are all elected . . . ."); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) ("The fact that a state chooses to select its judges by popular election . . . does not signify the abandonment of the ideal of an impartial judiciary . . . .").

While the State of Minnesota has elected its judges since 1857, it has also adopted special safeguards for judicial elections that make two things clear: first, that the State believes that elections for judges are significantly different from elections for political office, and second, that the State has a significant interest in maximizing the day-to-day independence of its judges, notwithstanding that they are elected. Minnesota's Constitution provides judges with longer terms of office (six years) than it does for State legislators (two years for representatives or four years for senators) or the Governor (four years).[5] These longer terms insulate judges from political pressures and the short-term judgments of voters. Moreover, the State Constitution requires judges wishing to run for political office to resign their judgeship before formally

[5] Minn. Const. art. 4, § 4 (state representatives and senators); Minn. Const. art. 5, § 2 (governor).

declaring their candidacy.[6] On the issue of qualifications for office, Minnesota's Constitution requires that all holders of judicial office be "learned in the law,"[7] thereby obligating those elected as judges to follow the ethical standards of the legal profession. *Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992) (en banc). Moreover, the state Constitution contains special rules for judicial vacancies. When such openings occur, the governor appoints an interim judge, and that judge does not run for election until the next general election occurring at least one year after the appointment.[8] This system allows the interim judge some initial "breathing room" free from political pressure. 490 N.W. 2d at 422-23. The Minnesota Legislature has supplemented these protections by making judicial elections non-partisan,[9] in order to counter the potential conflicts "aris[ing] between the demands of an election process and the judicial impartiality required to decide cases free from political maneuvering." 490 N.W.2d at 422. Finally, of course, Canon 5(A)(3)(d)(i) itself provides an essential safeguard. As the Eighth Circuit noted, the Minnesota Supreme Court likely enacted Canon 5(A)(3)(d)(i) "to prevent judicial campaigns from becoming routine political contests, thereby jeopardizing the independence and integrity of the State's judiciary." Pet. App. 51a.

Together, these provisions — which apply only to the election of judges — protect the independence and impartiality of Minnesota's judges, even though they are elected. As the Supreme Court of Minnesota has said, "[w]hile the framers of our state constitution have developed a system of [judicial] selection and election quite different from [the] federal scheme, they too designed a plan to recognize the

6 Minn. Const. art. 6, § 6.

7 *Id.* § 5.

8 Minn. Const. art. 6, § 8.

9 Minn. Stat. § 204B.06, subdiv. 6.

uniqueness and independence of the state judiciary." 490 N.W.2d at 420.[10] Petitioners' suggestion that the State has somehow waived or diminished its interests in avoiding judicial prejudice and the appearance of prejudice is simply wrong.

II. THE STATE OF MINNESOTA HAS COMPELLING INTERESTS THAT JUSTIFY ITS ATTEMPT TO PREVENT JUDICIAL CANDIDATES FROM ANNOUNCING THEIR PREDISPOSITIONS ON ISSUES LIKELY TO COME BEFORE THEM AS JUDGES.

The Minnesota Supreme Court construed Canon 5(A)(3)(d)(i) narrowly by adopting the Eighth Circuit's limited reading of the provision. *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002). Accordingly, as a matter of state law, Canon 5(A)(3)(d)(i) now restricts judicial candidates "only from making known how they would decide issues likely to come before them as judges." Pet. App. 53a. Thus, the speech at issue in this case are statements by judicial candidates indicating or promising how they would rule in cases likely to come before them—in essence, committing themselves to an outcome before hearing the merits of a case.

The State of Minnesota has several compelling interests that justify placing reasonable regulations on these kinds of statements. First, the State has a compelling interest in protecting the integrity and impartiality of its judiciary against

10 Indeed, Petitioners acknowledge that the point of all the safeguards described in the text is to further the State's interest in preserving the independence and integrity of its judges, notwithstanding their election. *See* Wersal Br. at 37 (noting that "Minnesota's electorate strongly supports judicial impartiality . . . Minnesota's citizens voluntarily established a judicial system that is structured throughout to ensure impartiality"); RPM Br. at 5 (noting that Minnesota's judicial election system is designed to protect "the institutional independence of the courts and the individual independence of judges").

the corrosive effects of ambition and popular pressure, and campaign promises inconsistent with the judicial role. Second, the State has a compelling interest in protecting its judiciary's *appearance* of integrity. Finally, the State has a compelling interest in protecting the finality of its judgments against claims by disgruntled litigants that their elected judges have openly prejudged cases; however often such Due Process challenges would succeed, the State has an interest in avoiding the rounds of extra litigation that would inevitably ensue.

A. Minnesota Has a Compelling Interest in Reasonable Speech Regulations Protecting the Actual Integrity and Impartiality of Its Judiciary.

As this Court has made clear in the context of cases evaluating speech restrictions on government employees, the government has a compelling interest in upholding the integrity of its institutions. *See, e.g.*, *Eu*, 489 U.S. at 231-32 (in First Amendment context, "a State indisputably has a compelling interest in preserving the integrity of its electoral process"). This interest is particularly important where independence from political pressures is an important element of the institution or office being protected, an interest recognized by this Court when it upheld wide-ranging restrictions on the political activities of Executive Branch employees against First Amendment challenge in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-65 (1973). This Court explained that Congress could constitutionally require the imposition of such restrictions on unelected federal employees because their office required them to "administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They [can be] expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *Id. at* 564-65; *see also id.* at 557 (upholding constitutionality of Hatch Act's bar on political activities by non-political civil servants on the theory that "federal service should depend upon meritorious performance rather than political service, and that political influence of federal employees on others and on the electoral process should be limited."). The values of impartiality, fairness, and integrity are undoubtedly at least as compelling where the judiciary is concerned, and likewise support reasonable restrictions on election speech. *Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality) ("The State's interests are especially important with regard to judicial officers.").

Indeed, this Court has recognized that the political pressures judges face in election campaigns pose very real risks to their work on the bench. In *Clements v. Fashing*, the Court upheld a State law requiring judges to resign before running for political office on the ground that "[a] campaigning Justice of the Peace might be tempted to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office." *Id.* Permitting judicial candidates to stake out positions on the issues likely to come before them if elected would pose a similar risk. As the Third Circuit has explained,

> If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.
>
> . . . [T]he judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.

Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991). *See also Deters v. Judicial Retirement & Removal*

Comm'n, 873 S.W.2d 200, 205 (Ky. 1994) ("Justice can hardly be blind if the judge has made a pre-election commitment or prejudgment which causes him or her to apply the blindfold only as to one side of an issue.").

These concerns are especially acute in the context of criminal trials. Criminal defendants depend more than any other litigant on the judge's impartiality: There are often strong political pressures calling for conviction, and criminal defendants depend on the judge to enforce their constitutional and procedural rights even when doing so is politically unpopular. The judge in a criminal trial "decides what evidence the jury may hear, how counsel may behave in front of the jury, what arguments may be made, how they may be made, what legal principles the jury must apply, and even, to a significant degree, who will sit on the jury." *Bracy v. Gramley*, 81 F.3d 684, 701 (7th Cir. 1996) (Rovner, J., dissenting), *rev'd*, 520 U.S. 899 (1997); *accord Carter v. Kentucky*, 450 U.S. 288, 302 n.20 (1981) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest wor[d] or intimation is received with deference, and may prove controlling." (collecting empirical evidence) (internal quotation omitted).

At the same time, popular sentiment often induces candidates for judicial office to run for election on promises to be "tough" on criminal defendants. These statements can commit judges to act in ways that adversely affect defendants' right to a fair trial. For instance, a judge in the State of Washington once pledged that among all candidates in the race, he would be the "toughest on drunk driving." *In re Kaiser*, 759 P.2d 392, 394, 396 (Wash. 1988) (en banc). In Ohio, a judge running for reelection stated that he "favors the death penalty for [all] convicted murderers." *In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 422, 425 (Ohio 1999). A judge on Texas Court of Criminal Appeals — the court of last resort for many criminal appeals — made

the following statement in his reelection campaign: "I'm very tough on crimes where there are victims who have been physically harmed. In such cases I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim." Clay Robison, *Judge's Politics an Exception to Rulings*, Hous. Chron., Feb. 4, 2001, at 2. Finally, in a recent disciplinary decision, the Indiana Supreme Court held that a trial judge who pledged in campaign statements to "stop suspending sentences" and "stop putting criminals on probation" had signaled to voters that he would "decide cases in his court without regard to evidence or applicable rules of law." This, the court found, was "inconsistent with a judge's duties to impose sentences in accordance with the law and the evidence. Nothing less than the constitutional right to due process commands such an approach to a judge's duties." *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1999) (per curiam).

If there were any doubt that election promises like these influence candidates' behavior when they take the bench, one need only look to the statements they make when standing for *re*-election. Despite regulations like Canon 5(A)(3)(d)(i), some sitting judges have campaigned for re-election based on how faithfully they have carried out their initial promises to be "tough on crime." One candidate in a recent Madison County, Indiana, judicial campaign, for example, ran the following television advertisement:

> "When Judge Spencer ran for judge of the Circuit Court, he promised to send more child molesters to jail . . . burglars to jail . . . drug dealers to jail . . . ." The advertisement depicted a cell door slamming shut with each statement. The narrator stated in conclusion, "He's kept his promise. Let's keep Judge Spencer." The [judge] appeared in his judicial robe at the beginning and at the end of the advertisement.

In re Spencer, 759 N.E.2d 1064, 1065 (Ind. 2001) (per curiam) (ellipses and brackets in original). And in Illinois, a

sitting judge campaigned for reelection on the claim that he had "never written an opinion reversing a rape conviction." *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 226 (7th Cir. 1993).

There is every reason to believe, as Minnesota has concluded, that once elected, candidates feel pressure to live up to their promises to be tough on crime. By committing judicial candidates to certain positions on issues likely to come before them, statements like these threaten the integrity of the judicial system and its ability to consider individual cases on their merits. Moreover, those litigants who need the protections of an impartial judge the most — politically unpopular groups, such as criminal defendants — are the ones who are most at risk. The State of Minnesota has reasonably concluded that campaign statements by judicial candidates announcing their predispositions on issues likely to come before them on the bench significantly undermine the independence and impartiality of the State's judiciary and should not be permitted.[11]

---

[11] Respondent Republican Party of Minnesota suggests that such problems can adequately be remedied (and hence, the state interest in the finality of its judgments can be protected) through the process of recusal for biased judges. RPM Br. at 38. This suggestion is incorrect. First, recusal on a case-by-case basis will often not provide a sufficient remedy, even if performed on an error-free basis, because many recusal statutes require proof of "special prejudice," and judicial prejudice can be near-impossible to prove, even where it is present. *See United States v. Guglielmini*, 384 F.2d 602, 605 (2d Cir. 1967) ("Few claims are more difficult to resolve than the claim that the trial judge, presiding over a jury trial, has thrown his weight in favor of one side to such an extent that it cannot be said that the trial has been a fair one."). States have an interest in preventing all kinds of prejudice and bias, and even if judges were to recuse themselves in cases where "special prejudice" were proven, States have an interest in preventing even such lesser levels of prejudice that might not warrant recusal standing alone. *See Ward v. Village of Monroeville*, 409 U.S. 57, 60-62 (1972). Second, States have a legitimate interest in not having their judges recused in wide categories of cases. A judge who has declared as a candidate his prejudgments as to wide categories of cases (e.g., statements as to all criminal defendants, or all murderers) could be recused from all such cases. This practical result could have serious consequences for a State seeking to administer its system of justice in a sensible and efficient manner. Finally, a case-by-case recusal rule for dealing with bias caused by judicial candidates' prejudgments would do nothing to prevent the declaration of such prejudgments in the first instance, which by their very utterance undermine the judiciary's appearance of integrity.

B. Minnesota Has a Compelling Interest in Reasonable Speech Regulations Protecting the Appearance of the Integrity of Its Judiciary.

In addition to its interest in maintaining the actual integrity of its judiciary, the State of Minnesota has an equally compelling interest in maintaining the judiciary's *appearance* of integrity. As this Court has long recognized, in order to fulfill the basic due process requirement of a trial that is free of bias, "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955) (internal quotations and citation omitted). "Even if there is no actual, demonstrable impact from a judge's refusal to recuse himself or herself" in a case where the judge's impartiality reasonably may be questioned, "there is presumptively a significant impact on the trust of the public and the litigants in an impartial judiciary." *In re Schenck*, 870 P.2d 185, 208 (Or. 1994) (per curiam). Solely to avoid the appearance of impropriety, this Court has ruled broadly that "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136.

The State of Minnesota is entitled to conclude that a judicial candidate who announces her predisposition on an issue (and may be turned out of office at the next election for failing to act consistently with that announcement) will have an inappropriate "interest in the outcome" if that issue comes before her as a sitting judge. The State may also conclude that such a campaign announcement would present the appearance of an unseemly *quid pro quo* of votes for judicial

rulings that would undermine the judiciary's appearance of impartiality.

Finally, this Court has noted that under the Constitution, a state is entitled to "protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965). Judicial candidates, through political pressures relating to issues likely to come before them, may confuse the public about the proper role of the courts. When judicial candidates' statements go beyond general statements of their judicial philosophy and venture into the realm of predisposition, the threat of confusion becomes very real. *See, e.g., Nevius v. Warden*, 944 P.2d 858, 860 (Nev. 1997) (per curiam) (Springer, J., dissenting) ("It goes beyond 'tough on crime' for a judge to claim that he is a 'crime fighter,' especially when, on top of this, the judge identifies his principal election supporter as being the State's attorney general. Judges are supposed to be *judging* crime not fighting it."). As one observer has noted,

> the courts do not define what activity is criminal; they do not catch criminals; they do not supervise them in prison or on probation or parole; and to whatever extent social conditions, such as poverty, prompt crime, the conditions are beyond the courts' control. To pretend that the problem of crime is simple, and that it will dissolve before a judge's decree, is to betray the ideals on which our nation rests.

Edmund B. Spaeth, Jr., *Reflections on a Judicial Campaign*, 60 Judicature 10, 13-14 (1976). Whereas judicial campaigns offer an opportunity for the public to gain a better understanding of the work performed by the judiciary, it remains critically important that such elections are conducted in a way that does not destroy Minnesota's interest in an independent judiciary. Canon 5(A)(3)(d)(i) strikes this balance in an appropriate manner.

C. Minnesota Has a Compelling Interest in Regulations That Protect the Finality of Judgments Entered in Its Courts and Avoid Unnecessary Litigation.

Finally, the State of Minnesota has a compelling interest in protecting the finality of criminal and civil judgments entered in its courts. *See Custis v. United States*, 511 U.S. 485, 497 (1994) ("Inroads on the concept of finality tend to undermine confidence in the integrity of [court] procedures and inevitably delay and impair the orderly administration of justice.") (internal quotations and citations omitted). Because rulings by judges who have made campaign statements suggesting a predisposition on the issues litigated are more vulnerable to due process challenges under this Court's precedents, Minnesota has a compelling interest in regulating the statements that give rise to these challenges. Even if relatively few of these due process challenges would ultimately succeed, the State has an interest in avoiding the uncertainty generated by the pendency of such challenges. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (acknowledging "the State's interest in the finality of its criminal judgments").

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. at 136. One of the essential pillars of a fair trial, of course, is an open-minded and disinterested judge. When a party claims to have been deprived of due process on the basis of judicial bias, "the test is whether the [judicial officer's] situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . ." *Ward*, 409 U.S. at 60 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (alteration in original)). Whatever the source of the alleged bias, the decisionmaker, at a minimum, must be "capable of judging a particular controversy fairly on the ba-

sis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941).

In *Ward*, this Court invalidated a local ordinance permitting the town mayor to serve as a judge in cases involving violations of ordinances and traffic laws. *See* 409 U.S. at 60. Even though the mayor received no direct payments as the result of the judgments he rendered, this Court found that the potential for contributions to the municipal fisc, which the mayor had a responsibility to protect, was sufficient to create a "possible temptation" to the mayor to rule in favor of the town to collect the fines, and that, accordingly, the arrangement violated the defendant's due process rights. *See id.* at 58, 60. Where a judicial candidate promises to rule in a particular way or makes sweeping policy proclamations — particularly with respect to unpopular groups such as criminal defendants — the temptation to make good is at least as strong.

Rulings consistent with campaign statements demonstrate both that the judge keeps her word and that she is "tough on crime." In such situations, as in *Ward*, the "incentive to disregard the presumption of innocence" may violate the Due Process Clause. *Mann v. Thalacker*, 246 F.3d 1092, 1097 n.2 (8th Cir.), *cert. denied*, 122 S. Ct. 541 (2001). Minnesota accordingly has a compelling interest in avoiding such a result.

CONCLUSION

For the foregoing reasons, compelling government interests support the reasonable regulation contained in Canon 5(A)(3)(d)(i).

Respectfully submitted,

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REPUBLICAN PARTY OF MINNESOTA, et al.,

Petitioners,

v.

VERNA KELLY, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE THE MISSOURI BAR IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE[1]

The Missouri Bar is a unified bar association consisting of all attorneys licensed to practice in the State of Missouri. Mo.R.Civ.P. 7.01. Currently, nearly twenty-five thousand (25,000) attorneys comprise The Missouri Bar.

Missouri attorneys have a strong interest in the validity of the Minnesota Announce Clause in Minn. Code of Jud. Con. Canon 5(A)(3)(d)(i).[2] The analogous Missouri rule, Mo.R.Civ.P. 2, Canon 5(B)(1)(c), contains a similar provision. This Missouri Rule applies to all candidates for state judicial office in Missouri, including both appointed and elected positions. Since the middle of the last century, all Missouri Supreme Court and Courts of Appeal Judges, and all trial level Circuit and Associate Circuit Judges in urban areas have been selected under the Missouri Nonpartisan Court Plan, a merit system known nationally as "The Missouri Plan." Mo. Const. Art. 5 Sec. 25(a-g).[3] Nonpartisan merit selection panels screen candidates for state appellate judgeships in Missouri and candidates for

---

[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that no party had any role in writing this brief. No one other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed with the consent of the parties, as documented in a letter filed by Respondents' counsel and signed by counsel for all parties.

[2] The Announce Clause provides "A candidate for judicial office . . . shall not . . . announce his or her views on disputed legal or political issues."

[3] For background information relating to The Missouri Plan, please see Hall, H., *Missouri Nonpartisan Court Plan*, 33 Kansas City L. Rev. 163 (1965).

trial level judgeships in Missouri's urban areas. *Id.* These panels submit three (3) nominees for each vacancy to the Governor of Missouri. *Id.* The person appointed must then stand for retention during the next general election. *Id.* at Sec. 25(c)(1). In Missouri's rural areas and smaller towns and cities, trial level judges run for election in partisan contests, first in primary elections, and then in general elections. R.S.Mo. Sec. 478.010.1 (1994) and Mo. Const. Art. 5 Sec. 27.

Missouri therefore has two (2) different procedures for selecting state judges. Of note, all candidates for judgeships in Missouri must abide by the Missouri Announce Clause. This Rule applies to candidates for judicial positions in partisan primaries and general elections in rural areas and those seeking nomination by a merit selection committee, appointment by the Governor, or retention by the voters under the Nonpartisan Court Plan.

The procedures for selecting judges in Missouri, including the reasonable and constitutional limitations in its Announce Clause, have resulted in the selection of fair, competent and independent judges, both on the trial and appellate levels, and in rural, suburban and urban areas, without violating the Free Speech Clause of the First and Fourteenth Amendments to the United States Constitution. For these reasons, Amicus Curiae The Missouri Bar urges affirmance of the decision of the Court of Appeals upholding the constitutionality of the Minnesota Announce Clause. Missouri's experience with a similar provision, which applies throughout a diverse state and

to candidates for both elected and appointed judgeships, may be informative to this Court.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The United States District Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit construed the Minnesota Announce Clause narrowly and then correctly upheld its constitutionality. The decisions below rest on well-established principles of federal constitutional law applied without strained logic or legal gamesmanship. Because Petitioners have demonstrated no error below, this Court should affirm the decision of the Court of Appeals.

All parties agree on the appropriate analysis in this case. The Minnesota Announce Clause is a content-based restraint on speech. To survive constitutional challenge, Respondents must demonstrate that the Announce Clause is narrowly drawn to achieve a compelling state interest. With the exception of one (1) amicus brief, Petitioners and Amici concede that the Court of Appeals correctly found that Minnesota has compelling interests "in an independent and impartial judiciary" and "in preserving the public's confidence in that independence." Accordingly, this Court must decide only whether the Minnesota Announce Clause is narrowly drawn to accomplish these admittedly compelling interests.

The Minnesota Announce Clause, as construed by the District Court, the Court of Appeals, and now the Minnesota Supreme Court, is drawn with great precision to

accomplish exactly and only Minnesota's compelling interests. The Announce Clause prohibits only those announcements on disputed political or legal issues likely to come before the candidate if elected. This provision directly addresses a specific problem, without spilling over into other areas. The specific interest addressed is the harm caused when judicial candidates make comments about matters on which they must later rule as judges. Few situations are more injurious to public confidence in the judicial system than a judge hearing a contested matter after making categorical public statements about the key issues in that matter. It makes sense, therefore, to draw the boundary of impermissible announcements by judicial candidates around those subjects likely to come before the court. Comments of this type are likely to damage the litigants' and the public's views of the impartiality and fairness of the proceeding. Comments on other topics are not. Further, contrary to the contention of Petitioners, the subjects *likely* to come before a state court are reasonably predictable. Judicial candidates and the persons charged with enforcing the Announce Clause should be able to predict with some precision whether a specific topic is *likely* to be the subject of a litigated case in that particular court.

The Minnesota Announce Clause works in practice and addresses only the types of announcements which might defeat Minnesota's compelling state interests. This Court should affirm the decision of the Court of Appeals and uphold the constitutionality of the Minnesota Announce Clause.

ARGUMENT

The parties agree on the appropriate constitutional analysis. "[A]n absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *U.S. v. Grace*, 461 U.S. 171, 177 (1983); *U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 813 (2000). Respondents established both elements below, to wit: 1) the compelling nature of Minnesota's interests; and 2) the appropriate narrowness of the restriction and its effectiveness in accomplishing those interests.

A. Petitioners Concede that Minnesota Has Compelling State Interests.

Petitioners have confessed the first element in the analysis of the constitutionality of Minnesota's Announce Clause. They acknowledge that the Court of Appeals correctly identified two (2) separate compelling state interests, judicial independence and judicial impartiality. Petitioners Brief at pp. 5-13.[4] Amici American Civil

[4] Petitioners argue, however, with hyper-technical wordplay, that only judicial impartiality is at issue here. They cite as authority for this proposition a speech by the Lord Chancellor, Lord Irving of Lairg, and the *Remarks of Hon. Shirley S. Abrahamson* in The St. John's Journal of Legal Comment. *See* Petitioners' Brief at pp. 6-7. Amicus Curiae asserts that the concepts of judicial "independence" and "impartiality" are inter-related concepts and any attempt to separate them for purposes of analyzing the constitutionality of the Announce Clause is artificial. As noted, *infra*, the problem which Minnesota intended to address through the Announce Clause is the harm caused when judicial candidates comment publicly on

Liberties Union and The Minnesota Civil Liberties Union make a similar concession:

> Properly understood, the governmental interest at stake in this case is the compelling interest in avoiding compromise of the judicial function of deciding each case on the basis of a fair and impartial hearing, after giving due consideration to the arguments and evidence presented by the parties. *Amici agree that this function is central to the rule of law.*

ACLU Brief at p. 3 (emphasis added); *see also* Public Citizen Brief at p. 2 ("Public Citizen agrees with the lower Courts' finding that these interests are compelling.").

As Petitioners concede the first analytical element in favor of Respondents, this Court must decide only whether the Minnesota Announce Clause is narrowly drawn to accomplish Minnesota's admittedly compelling state interests.

B. The U.S. District Court and Court of Appeals Properly Gave the Minnesota Announce Clause a Narrow Construction.

Both the District Court and the Court of Appeals correctly construed the Minnesota Announce Clause to apply only to comments on disputed political and legal issues which are "likely to come before the candidate if

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issues and are then asked to hear cases involving those issues. It does not matter whether this problem is framed in terms of "independence" or "impartiality." Even the Lord Chancellor admits the connection between the two (2) interests and their at most "slight difference." *See* Petitioners' Brief at p. 7.

elected into office." *Republican Party v. Kelly*, 247 F.3d 854, 881 (8th Cir. 2001); and *Republican Party v. Kelly*, 63 F. Supp. 2d 967, 974-83 (D.Minn. 1998). The Minnesota Supreme Court has since adopted this construction of the Minnesota Announce Clause. *In re the Code of Judicial Conduct*, ___ N. W. 2d ___, 2002 WL 126537 (Minn. January 29, 2002). Petitioners suggest that this narrow construction of the Rule is somehow improper and therefore taints the analysis below. Yet, in taking this approach, the lower courts followed principles of statutory construction well-established in the decisions of this Court, to-wit: "where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2279 (2001), (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988), this Court reiterated that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* at 575 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

The narrowing construction of the Minnesota Announce Clause by the lower Federal Courts, which has now been adopted by the Minnesota Supreme Court, is analogous to the approach taken and approved by this Court in *Edward J. DeBartolo, supra*, and in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-05 (1985). This well-established and sanctioned approach to statutory construction does not constitute the type of "disingenuous evasion" which this Court disallowed in *Salinas v. U.S.*, 522 U.S. 52, 60 (1997) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 57 n.9 (1996). There is nothing

"disingenuous" about the narrow construction given to the Minnesota Announce Clause by the District Court, the Court of Appeals and the Minnesota Supreme Court. It is not only "fairly possible," but reasonable and obvious to limit the Announce Clause to those announcements on disputed legal issues "likely to come before the candidate if elected into office." Statements by judicial candidates are worrisome when they relate to matters likely to come before those persons once they become judges. They are far less problematic when they relate to other matters.

The Court of Appeals based its acceptance of the District Court's narrow construction of the Announce Clause on its analysis of the approach the Minnesota Supreme Court would likely take in construing the Rule. *Republican Party v. Kelly*, 247 F.3d at 881. In fact, the Minnesota Supreme Court has now adopted precisely this construction of the Announce Clause. *In re Code of Judicial Conduct, supra*. Even absent the adoption of the narrow construction by the Minnesota Supreme Court, this Court should give great deference to the lower courts' construction of the Announce Clause. *Brockett v. Spokane Arcades*, 472 U.S. at 499 ("Normally, however we defer to the construction of a state statute given it by lower federal courts."); *see also Charden v. Fumero Soto*, 462 U.S. 650, 654-55 n.5 (1983). This Court defers to lower federal courts on state-law issues unless there is "plain error" or the constructions are "clearly erroneous." *Brockett v. Spokane Arcades*, 472 U.S. at 500 n.9. This is a sensible approach to the respective roles of the lower Courts and this Court. As noted in *Brockett*, "[w]e do so (give deference to lower federal courts on issues of state statutory

construction) not only to 'render unnecessary review of their decisions in this respect,' but also to reflect our belief that the District Courts and Courts of Appeals are better schooled in and more able to interpret the laws of the respective States." *Id.* at 500 (parenthetical added for context, cites omitted). Now that the Minnesota Supreme Court has spoken on this issue, Petitioners cannot reasonably argue that this Court should analyze the Minnesota Announce Clause as written, as opposed to the manner in which it has been construed.

Finally, as noted by the Court of Appeals, Petitioners failed to challenge the District Court's narrow construction of the Minnesota Announce Clause in their opening briefs in the Court of Appeals and therefore waived any complaints about that aspect of the District Court's decision. *Republican Party v. Kelly*, 247 F.3d at 881.

C. The Announce Clause as Construed Is Narrowly Drawn and Accomplishes the Purpose of Furthering Minnesota's Compelling Interests.

The Minnesota Announce Clause as construed by the lower Federal Courts and the Minnesota Supreme Court is precisely drawn to achieve Minnesota's compelling interests "in an independent and impartial judiciary" and "in preserving the public's confidence in that independence." Statements by judicial candidates about matters which are likely to come before the court undermine that confidence. The Minnesota Announce Clause as construed addresses those problems exactly without burdening other categories of speech.

Petitioners have seized on Judge Posner's concern as set forth in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993), that the type of limiting construction employed by the lower Federal Courts here (and now adopted by the Minnesota Supreme Court) will effectively preclude virtually all comments by judicial candidates. He argues that just about every possible political and legal issue might conceivably surface in a litigated case. *Id.* at 229. This argument both misses the point and overstates the case.

Initially, it does not matter whether the number of prescribed topics is few or many. If a subject is likely to come before a Minnesota judge if elected, that person as a candidate should not comment. This restriction is neither arbitrary nor unfair. It is inextricably connected to the duties and obligations of judges and therefore applies to persons who want to be judges. While judicial candidates have First Amendment rights, the nature of the positions they seek necessarily requires certain reasonable limitations on those rights.

The limitations in the Announce Clause are really no different than the reasonable content-based restrictions which apply in other contexts due to the nature of the employment or position sought. Persons who aspire to certain professions and positions understand that there may be limitations on their abilities to express their views. Professionals understand and accept limitations on their abilities to discuss privileged information. Government employees and independent government contractors accept limits on their rights to express their

opinions. *Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 676 (1996) ("We have, therefore, 'consistently given greater deference to government predictions of harm used to justify restriction of (governmental) employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.' "(parenthetical added)); *United Public Workers of America v. Mitchell*, 330 U.S. 75, 98-103 (1946); and *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). Military personnel face similar restrictions on their abilities to exercise the types of First Amendment Free Speech rights available to persons employed elsewhere. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); *Brown v. Glines*, 444 U.S. 348, 354 (1980); and *Parker v. Levy*, 417 U.S. 733, 744-58 (1974).

This Court has consistently held that the First Amendment rights of the other key participants in the legal system, attorneys, may be limited in order to ensure the system's proper functioning. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070-72 (1991); *Sacher v. U.S.*, 343 U.S. 1, 8 (1952). Even parties' First Amendment rights may be limited in the context of a litigated case. In *Seattle Times Company v. Rhinehart*, 467 U.S. 20 (1984), this Court unanimously held that a newspaper which had been sued in a defamation suit could be enjoined from publishing certain matters. *Id.* at 32-33. This Court noted: "[A]lthough litigants do not surrender their First Amendment rights at the courthouse door, those rights may be

subordinated to other interests that arise in this setting." *Id.* at 33 n.18.

Similarly, the First Amendment rights of judges are not absolute. Minnesota judicial candidates must understand that as part of the process of seeking judicial office they cannot make statements as candidates which might later reasonably call into question their independence and impartiality as judges. If Minnesotans want to serve as judges, they must accept the reasonable limitations on those campaign activities which the State of Minnesota has determined might affect their abilities to later carry out the State's admittedly compelling interests.

Apart from their relevancy, the concerns about the alleged all-encompassing nature of the prohibition in the Minnesota Announce Clause as construed are exaggerated. As a matter of fact, the types of cases and issues which state court judges are *likely* to consider are relatively proscribed. The extreme example cited by Judge Posner, the possibility that the validity of the war in Yugoslavia might arise in the context of a family law case, is certainly not *likely*. Persons knowledgeable about the state courts should be able to discern without particular difficulty whether an issue is likely to arise in subsequent litigation.

Petitioners and Amici downplay the clear, cogent and exact connection between the reasonable restrictions of the Minnesota Announce Clause as construed and the admittedly compelling State interests they serve. They assert instead that there are less restrictive methods available to Minnesota to achieve these same goals. Where they err, however, is in citing to possible reforms and

rules which further the goals of improving confidence in the judicial system by alleviating problems other than the problems caused when judicial candidates comment on issues and are later asked to hear cases involving those issues. For example, in its scholarly and well-written brief, Public Citizen advocates campaign finance reform, noting that large campaign contributions by lawyers to judges are a more serious problem than the problem which Minnesota sought to alleviate through its Announce Clause. That may be, but the existence of potential remedies for the problems caused by large campaign contributions as well as other problems identified by Petitioners and Amici is not the issue. This Court must determine not whether there are more narrow alternatives which further the broad goals of increasing public confidence in the judicial system. Instead, the issue is whether there is a more narrow way to solve the specific problems caused by comments made by judicial candidates on issues which they must later decide as judges.

In effect, Petitioners improperly seek to attack Minnesota's approach to a specific problem by saying that the broad goals of improving public confidence can be accomplished by attacking other problems in other ways. All of the allegedly less restrictive alternatives to the Minnesota Announce Clause suggested by Petitioners and Amici fail for this reason. They address various aspects of the judicial system which may need improvement, but which do not relate directly to the precise problem which Minnesota sought to alleviate in adopting the Announce Clause.

CONCLUSION

The Court of Appeals correctly construed the Minnesota Announce Clause narrowly and found it constitutional and not violative of the Free Speech Clause of the First and Fourteenth Amendments to the U.S. Constitution. This Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, et al.,

Petitioners,

v.

VERNA KELLY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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INTEREST OF AMICI STATES

Amici are States that have adopted a canon of Judicial Ethics modeled on Canon 5 of the ABA Model Code. Some of the States, like Minnesota, have adopted a canon that bars a judicial candidate from "announcing" his or her views on legal or political issues that are likely to come before the court.[1] Others have adopted a canon that bars the making of statements that "commit" or "appear to commit" the candidate with respect to cases, controversies or issues that could come before the courts. *See* Appendix A. Amici come before the Court as a community of related sovereign States to represent the interests of their own citizens in ensuring the election of impartial judges, not only in their own home States, but in all States across the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The majoritarian difficulty asks not how elected/unaccountable judges can be justified in a regime committed to democracy,[2] but rather

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[1] As written, Minnesota's Canon forbids a judicial candidate from "announc[ing] his or her views on disputed legal or political issues." 52 M.S.A., Code of Jud. Conduct, Canon 5A(3)(d)(i); Pet. App. 134a. The district court construed the phrase "legal or political issues" to mean "issues likely to come before the court." Pet. App. 129a. That construction has been confirmed by the Minnesota Supreme Court. *See* Appendix B.

[2] *Cf.*, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (Yale, 2d ed. 1986) ("The root difficulty is that judicial review is a countermajoritarian force in our system.").

> how elected/accountable judges can be justified in a regime committed to constitutionalism. . . . When those charged with checking the majority are themselves accountable to, and thus influenced by, the majority, the question arises how individual and minority protection is secured.[3]

Just as the Framers of the Constitution confronted the "countermajoritarian difficulty" in resolving on an appointive, life-tenured judiciary for the United States, so do States continually confront the "majoritarian difficulty" presented by having an elected judiciary. What is mandated by fundamental notions of due process is an impartial judiciary. *In re Murchison*, 349 U.S. 133, 136 ("A fair trial in a fair tribunal is a basic requirement of due process.") And the satisfaction of this mandate calls upon the States to reconcile their commitment to judicial accountability (the democratic ideal), on the one hand, and their commitment to judicial impartiality (the constitutional ideal), on the other. The history of state regulation of judicial ethics has been a continuous experiment to the end of a perfect reconciliation of these ideas.[4] The States have not yet succeeded, but the Tenth Amendment guarantees to them the right to keep trying. *See, Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (O'Connor, J., concurring); *New State Ice Co. v. Liebmann* 285 U.S. 262,

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[3] Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U.Chi.L.Rev. 689, 694 (Spring, 1995).

[4] *See, e.g.*, Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts* 61-SUM Law & Contemp. Probs. 79, 87-99 (Summer, 1998).

311 (1932) (Brandeis, J., dissenting); *cf., Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (States' power to determine the qualifications of their most important government officials is reserved by Tenth Amendment).[5]

1. Accountability can never trump impartiality as the overarching governing rule for courts. Impartiality of the judiciary is *sine qua non* to the fundamental legitimacy of any government. Citizens must have confidence that their cause will be judged only in accordance with the Rule of Law. Moreover, confidence in the impartiality of every State's judiciary is essential to securing that "general citizenship" of all states' citizens, *Cole v. Cunningham*, 133 U.S. 107, 113 (1890), which is the vision of both the Comity Clause, Const., art. IV, § 2, cl. 1, and the Fourteenth Amendment. For States who will surrender neither the ideal of impartiality nor the ideal of accountability, Canon 5 is essential.

2. Canon 5 is part of that ongoing experiment to reconcile the competing interests of the "majoritarian difficulty." It seeks to secure that area of speech that is most

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[5] Alexis DeTocqueville, predicted: "I am aware that a secret tendency to diminish the judicial power exists in the United States. . . . Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself." 1 Alexis de Tocqueville, *Democracy in America* 329 (Shocken Books ed., 1961).

conducive to producing an informed electorate, while excluding only that area of speech that threatens the ideal of a judiciary independent of allegiance to special interests. Canon 5 reflects the common sense understanding that a judge who feels he is beholden to special interests for his job may be unable to judge impartially. *Cf., Tumey v. Ohio*, 273 U.S. 510 (1927) (due process violated because adjudicator, town's mayor, received compensation each time he convicted a defendant, but received nothing if he acquitted). It is essential to ensuring that sitting judges are not placed at an unfair disadvantage because of their own, distinct, ethical obligations to refrain from commenting on pending matters. *See, e.g.*, Cal. Code of Jud. Ethics, Canon 3B(9). And Canon 5 is essential to staunch the flow of ethical judges who leave the bench because of increasing stress due to political pressures.

ARGUMENT

I. THE PUBLIC HAS A COMPELLING INTEREST IN ENSURING THE IMPARTIALITY OF EVERY STATE'S JUDICIARY

1. The core objective of Canon 5A of Minnesota's Code of Judicial Conduct and Canon 5 of the ABA Model Code is to ensure an impartial judiciary. It is difficult to imagine a more compelling public interest. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of even-handed justice . . . is at the core of due process"). Impartial adjudication – adjudication in accordance with the established Rule of Law, rather than in accordance with personal views – is the foundation of a judiciary's essential legitimacy. *See*

Marbury v. Madison, 1 Cranch 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."). Applying the Rule of Law is, of course, not always an easy task. Still, we insist that judges have "allegiance to nothing except the effort, amid tangled words and limited insights, to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law." Felix Frankfurter, *Chief Justices I Have Known*, in *Of Law and Men* 138 (Elman ed. 1956).

It has often been in the discussion of stare decisis that this Court has had occasion to reiterate the primacy of law over man, which is the cornerstone of judicial impartiality. In concurring based upon a precedent with which he disagreed, Justice Stevens observed that "[c]itizens must have confidence that the rules on which they rely in ordering their affairs – particularly when they are prepared to take issue with those in power in doing so – are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Dept. of Health v. Florida Nursing Home Ass'n.*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

2. Citizens in States with an elected judiciary unquestionably share this interest in an impartial judiciary. To be sure, permitting judges to be elected, rather than appointed, is consequential. But this does not mean that the interests of voters in the election of judges is the same as their interests in the election of legislators or executive branch leaders. To the contrary, when voting for judges, the voter's interest is as a potential future litigant; when voting for legislators and executives, the voter's interest is that of one constituent out of thousands. *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics* 1059 (Summer, 1996). Impartiality – in the sense described above – is indispensable with respect to the former interest, not to the latter. Indeed, this Court implicitly has recognized that voter interest in judicial elections (unlike in legislative elections) is not about the opportunity to have personal or partisan points of view represented i a department of government. *See Wells v. Edwards*, 409 U.S. 1095 (1973) (one-person, one-vote requirement does not apply to apportionment of judicial districts).

It is, therefore, no answer to assert that the State could not impose a rule akin to Canon 5 on legislative or executive branch elections. Those campaigns involve election of representatives to the political branches of government. Campaign debate in such a context is the precursor of debate within and between those branches, and campaign speech thus apprizes the voter of a candidate's position within the anticipated realm of debate. But the judicial process is not one of debating toward what the law *should* be. It is rather the finding of what the law *is*. *Cf., Tennessee Valley Authority v. Hill*, 437 U.S. 153,

194-195 (1978) ("Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.").

Legislatures are large, multi-member bodies, which act upon the society at large. Even the voter whose candidate is defeated in an election is not, thereafter, powerless. Acting collectively with other members of a political party and with supporters of other legislators, he or she is still able to influence the enactment of legislation. But judges, unlike legislators, act individually – or, in the case of a reviewing court, as a small group that reaches decision in secret. And judges act upon individuals, in individual adjudications. Thus, although political corruption is the subversion of a process, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985), a single corrupt legislator, acting alone, cannot deny due process to any individual. By contrast, the election of a single biased judge can. The public interest in electing impartial judges should, therefore, be given greater weight than is the public interest in preventing corruption in legislative or executive campaigns.

3. This heightened interest in the election of impartial judges is held not only by the citizens of States that hold judicial elections; it is held by the citizens of all States. Citizens of one State may be subject to the judgments of another State's courts by operation of the Full Faith and Credit Clause, Const., art. IV, § 1. Similarly, the Comity Clause, Const., art. IV, § 2, cl. 1, among whose central purposes was "to make American citizens as free in one State as in another," *Ogden v. Saunders*, 12 Wheat.

213, 274 (1827), opens the doors of every State's courthouse to the citizens of every other State. *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3 (1950). Perhaps more importantly, citizens of Amici States may find themselves defending against prosecution or civil action in Minnesota courts.

Despite their "general citizenship," *Cole v. Cunningham*, 133 U.S. at 113, the citizens of Amici States cannot vote for a Minnesota judge, no more than they can vote for a Minnesota legislator. *See Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383 (1978) (acknowledging that suffrage has been understood to be tied to an individual's identification with a particular State). But, unlike a legislator, a Minnesota judge owes a duty of constitutional dimensions to non-citizens who appear before him in his official capacity. Indeed, this constitutional duty extends even to those who are not citizens of the United States. *See, Plyler v. Doe*, 457 U.S. 202 (1982) (equal Protection Clause applicable to illegal aliens).

The interest sought to be protected by Minnesota's Canon 5 concerns more than systemic corruption. It is addressed to the protection of individual liberty interests that are shared by all of the residents of Minnesota, voter or not, and indeed, by all of the residents of Amici States.

II. CANON 5 ACHIEVES A REASONABLE BALANCING OF COMPETING IMPORTANT INTERESTS

Minnesota's Canon 5, as limited by the Minnesota Supreme Court, *see* note 1, is sufficiently flexible to permit communication of information important to voters in

judicial elections. As limited, Canon 5 proscribes only discussion of "issues," and then, only those issues that are *"likely* to come before the court." Pet. App. 129a (emphasis added). As the Court of Appeals correctly noted, "general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause." Pet. App. 54a. Moreover, as the court also pointed out, the Minnesota Judicial Board had approved extensive lists of sample questions that interested voters could pose to judicial candidates consistent with Canon 5, that these were "wide-ranging," including such topics as a candidate's judicial philosophy, issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's perception of a judge's role in the judicial system. Pet. App. 5a.

That speech which is limited by Canon 5 – speech which "announc[es]" a judicial candidate's views on issues likely to come before the court – is limited by necessity. Enforcing Canon 5 is the only way to ensure that judicial elections do not deteriorate into full-scale debates with potentially destructive consequences to the administration of justice. If one candidate is *permitted* to announce his views on controversial legal issue, then, realistically, all other candidates *must* announce their views – either for the purpose of showing that they share the same views or for distinguishing themselves from the other. Candidates who, out of respect for the integrity of the judicial process, would prefer not to announce their views on a controversial legal issue, will have no realistic choice but to do so or surrender the election.

Election campaign pressures threaten the integrity of the judicial system. Even with Canon 5 there are great pressures on elected judges to do justice without regard to the possible electoral consequences of doing so. As Justice Stevens is reported to have told the American Bar Association Annual Meeting in 1996: "[I]t was 'never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.' "[6] In another expression of dismay over the challenges to judicial impartiality, the late Otto Kaus, a universally respected Justice of the California Supreme Court, observed that adjudicating controversial cases during an election is "like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving." Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 Notre Dame L. Rev. 1133 (May 1997); *see also* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. Cal. L. Rev. 1969, 1980 (September 1998).

These pressures are compounded by Canon 3B(9) of the ABA Model Code which precludes sitting judges from "mak[ing] any public comment [about a pending or

[6] Justice John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting 12 (Aug. 3, 1996) (quoting Florida Supreme Court Justice Ben Overton), *reported in* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U.L.Rev. 308, 310 (1997).

impending proceeding in any court] that might reasonably be expected to affect its outcome or impair its fairness."[7] In 1986, for example, allegiance to ethical considerations nearly doomed the campaign of North Carolina Supreme Court Justice James Exum for election to the position of chief justice. Justice Exum was targeted for his death-penalty decisions by supporters of his opponent, but he chose not to respond to comments made during news conferences by families of murder victims. Fortunately, in this case Justice Exum's opponent was also a sitting supreme court justice who graciously defended his colleague's silence as compelled by the rules of ethics.[8] It is quite likely that notorious legal issues of interest to the voting public will also be implicated in matters pending in the courts, *see* Uelman, *supra*, and sitting judges risk defeat at the polls for being unable to respond to a competitor's announcement of his views on the issue. Indeed, Professor Carrington suggests that the bad situation is made even worse by media contribution to public cynicism: "[S]itting judges may with increasing frequency be sitting ducks. The retention election devised as part of the Missouri plan has become, as a result of the advent of the negative spot commercial, a

[7] Professor Rotunda strongly endorses this Canon, at least insofar as it relates to proceedings in the judge's own court. *See* Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and Sanctions – A Case Study of the Microsoft Litigation*, 2001 U. Ill. L. Rev. 611 (2001).

[8] *See* Samuel Latham Grimes, *"Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. Rev. 2266, 2288 (September, 1998).

potential nightmare; candidates for retention in high judicial office can be especially vulnerable to electronic attack because they cannot reciprocate in kind against an adversary." Carrington, *supra* at 111.

In the end, if Canon 5 should be stricken down, the public will be the loser. Not only will public cynicism about judicial processes likely deepen, but ethical judges, with increasing frequency, will be defeated at the polls for their silence in the face of attacks by candidates unrestrained by rules of ethics. Alternatively, qualified judges will simply leave the bench in despair of being unable any longer to ignore the crocodiles in their bathtub. Justice Kaus, for one, retired from the California Supreme Court in 1986, during an extremely contentious election campaign to unseat three Supreme Court justices because of their death-penalty decisions – even though he was not himself on the ballot.

Recusal is no answer. As a threshold matter, recusal is an individual remedy and does not address the lack of public confidence in a system that permits political passion to infect its judicial processes. A recent national survey conducted for the National Center for State Courts revealed that a troubling 81% of the population agreed with the statement: "Judges' decisions are influenced by politics." National Center for State Courts, Survey, *How the Public Views the State Courts* 41 (1999).[9]

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[9] A racial/ethnic breakdown of the figures revealed that 85.2% of African-Americans agreed with the statement. The figure was 80.4% for Latino responders. *Id.*

Furthermore, recusal based on *issue*-bias is conceptually inconsistent with the asserted purpose for opening up public debate among judicial candidates in the first place. Vermont's Justice Shepard goes so far as to suggest that liberalizing recusal procedures to encompass "issue bias" works a fraud on the public:

> The public has been induced to vote for a candidate in the belief that the candidate will implement a certain policy, say, imposing maximum sentences on wife beaters. Even while campaigning and promising this strict policy, however, the candidate knows that any wife beater brought before him will be able to prevent him from even hearing the case, much less imposing the maximum sentence. This arrangement for disconnecting free and unfettered campaign promises from any possibility they will be carried out . . . hardly results in the sort of open and robust democracy that critics of the Canons purport to defend.

Shepard, *supra* at 1082-1083.

Finally, liberalizing recusal procedures increases the strain on state court benches, who must shuffle the cases and calendars to an immune judge. And it is not implausible that judicial candidates will be induced by skilled lawyers into making commitments on issues (or seemingly so), for the very purpose of setting up a justification for a later disqualification. *Cf., MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1340 (Fla. 1990) (Kogan, J., dissenting) (danger that attorneys who wish to steer their cases away from a particular judge need do no more than contribute a large sum to that judge's campaign); *Pierce v. Pierce*, ___ P.3d ___, 2001 OK 97, 2001 WL

1408241, p. 10 (Ok. 2001) (Watt, C.J., concurring) (same). Such a circumstance is not far-fetched, considering that many lawyers today represent advocacy groups that are involved in issues of public importance and whose causes may be implicated in anticipated proceedings in a local court or in the State's high court.

CONCLUSION

Canon 5 is a legitimate and measured tool for balancing the competing democratic ideals of accountability and impartiality. For the reasons stated, Amici States respectfully urge the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

RELATED CANONS OF JUDICIAL ETHICS OF AMICI STATES

Ariz. R. Sup. Ct. 81, Canon 5B(1)(iv) ("announce")

Cal. Code Jud. Ethics, Canon 5B(1) ("commit")

Mo. R. Bar Rule 2.03, Canon 5(b)(1)(c) ("announce")

Mont. Canons of Jud. Ethics, Canon 30 ("announce")

Okla. Code Jud. Conduct, Canon 5A(3)(d)(ii) ("commit")

Tex. Govt. Code Ann., tit. 2, subtit. G app. B ("announce")

Wash. Code Jud. Conduct, Canon 7(B)(ii) ("commit")

APPENDIX B

STATE OF MINNESOTA IN SUPREME COURT

C4-85-697

In re the Code of Judicial Conduct

ORDER

In *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001), *cert. granted*, (U.S. Dec. 3, 2001) (No. 01-521), the United States Court of Appeals for the Eighth Circuit held that the provision of Minnesota Code of Judicial Conduct that prohibits a candidate for judicial office from announcing "his or her views on disputed legal or political issues," Canon 5(A)(3)(d)(i) (the announce clause), as construed by the district court in *Republican Party of Minnesota v. Kelly*, 63 F.Supp.2d 967 (D.Minn. 1999), is narrowly tailored to further compelling state interests. It has come to the attention of this court that the interpretation of the announce clause by the federal district and appeals courts has given rise to questions about the interpretation of the announce clause by this court. We issue this order adopting the interpretation of the federal court of appeals to clarify our position to the Board on Judicial Standards and the Lawyers Board of Professional Responsibility, which have the first level of responsibility for enforcement of the Canon.

IT IS HEREBY ORDERED that the announce clause of Canon 5(A)(3)(d)(i) shall be enforced in accordance with the interpretation of that clause by the United States

Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001).

Dated: January 29, 2001

BY THE COURT:

/s/
Kathleen A. Blatz
Chief Justice

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

No. 01-521

In The
Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,
v.
VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief in Support of Respondents for *Amici Curiae* Brennan Center for Justice at NYU School of Law, American Judicature Society, Campaigns for People, Citizen Action/Illinois, Kansas Appleseed Center for Law and Justice, North Carolina Center for Voter Education, Protestants for the Common Good, The Reform Institute, and Wisconsin Citizen Action

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INTEREST OF THE *AMICI*[1]

Amici curiae are the Brennan Center for Justice at NYU School of Law and other national and statewide organizations working to promote and preserve judicial fairness and impartiality. *Amici* have an interest in this case because pressures to relax canons of judicial conduct that safeguard important distinctions between judges and other elected officials interact dangerously with the increasing role of money in judicial elections, which is already eroding public confidence in the integrity of state courts. The specific interests of each *Amicus* in state judicial elections and the question presented in this case are set forth in greater detail in the appendix.

SUMMARY OF THE ARGUMENT

Speech by candidates for judicial office puts in tension two constitutional values: the compelling interest in preserving the integrity and impartiality of our courts guaranteed by the Due Process Clause; and the freedom of speech protected by the First Amendment. Striking the proper balance between these interests is critical to maintaining the traditional role of our nation's courts as neutral, independent arbiters that decide cases under a rule of law.

Due process in the context of litigation means that parties have an opportunity to be heard by an impartial judge

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[1] The *Amici* file this brief with the consent of all parties. The parties have separately filed their letters of consent to the participation of an array of *amici* in this matter, including those represented herein. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

who will fairly apply the law to the facts of their case to reach a decision. A judge who has determined in advance how to decide disputed issues effectively denies litigants the impartiality protected by the Due Process Clause. By making campaign statements about contested issues before they are presented in the context of a particular case, a judge may create both the appearance and the reality of bias.

Choosing judges by popular vote does not diminish the importance of judicial impartiality and independence. Those values are seriously threatened, however, by the burgeoning role of money in judicial campaigns. In recent years, candidates and interest groups have spent millions of dollars in fiercely contested judicial races. One deeply troubling consequence is an increased incentive for judicial candidates to attempt to garner support – in the form of votes, contributions, or advertising campaigns by interest groups – by indicating how they will rule on issues likely to come before the courts.

Preserving the impartiality, integrity, and independence of judges necessarily requires some limits on the statements they may make in seeking office. Judges, unlike elected members of the legislative and executive branches, are by the nature of their office expected *not* to commit themselves to take particular positions or to cater to particular constituencies if selected. This fact justifies limits on speech by judicial candidates that would not be tolerated for other elected public officials. The limits imposed on the states' ability to regulate the role of money in campaigns under *Buckley v. Valeo*, 424 U.S. 1 (1976), make other methods – such as limited but direct restrictions on candidate speech – all the more important to protect the states' interests in a fair and impartial judiciary.

Toward this end, most states have adopted some version of Canon 5A(3)(d)(ii) of the ABA Model Code of Judicial Conduct. This canon bars judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Minnesota has adopted a similar canon that prohibits candidates from "announc[ing] their views on disputed legal or political issues" (the "Announce Clause"). The courts below, and now the Minnesota Supreme Court, have construed the Announce Clause as substantively the same as ABA Canon 5A(3)(d)(ii). As construed, the Minnesota rule does not violate the First Amendment.

Prohibiting judicial candidates from making statements that commit or appear to commit them to particular resolutions of cases, controversies, or issues is justified under the First Amendment. The states' constitutional obligation to preserve judicial independence and impartiality outweighs the burden on speech imposed by such a restriction. Regulations like ABA Canon 5A(3)(d)(ii) are also narrowly tailored to serve a compelling public interest because only a provision that targets speech during an election can address the specific risks to impartiality presented by candidates' campaign statements.

The American conception of due process is inconsistent with the notion that prospective judges have a First Amendment right to seek office by indicating how they will resolve particular cases or issues that may come before them. Recognizing such a right would undermine the impartiality of our courts and the public confidence that is the ultimate foundation for the independent role of the judiciary under our federal and state constitutions.

ARGUMENT

I. States Have a Compelling Interest in Courts That Are, and Appear to Be, Fair and Impartial, Regardless of the Method of Judicial Selection.

A. Judicial Neutrality Is an Essential Component of Due Process.

"There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring). That states have a compelling interest in maintaining fair and impartial courts has never been seriously doubted. Chief Justice Rehnquist has described "an independent judiciary with the final authority to interpret a written constitution" as "one of the crown jewels of our system of government today." William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 AM. U. L. REV. 263, 273-74 (1996). Judges "must strive constantly to do what is legally right, all the more so when the result is not the one the Congress, the President, or 'the home crowd' wants." Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 HAWAII L. REV. 603 (1998) (quoting William H. Rehnquist, *Dedicatory Address: Act Well Your Part; Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 229-30 (1980)).[2]

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[2] Likewise, impartiality has always been the focus of the Congressionally mandated oath of office for federal judges: "I do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge all the duties incumbent on me as [a federal judge] under the Constitution and laws of the United States." 28 U.S.C. § 453; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

Preserving fair and impartial state courts is not merely good government; it is compelled by the Fourteenth Amendment. The ability to present one's case to an impartial tribunal is a fundamental component of due process:

> The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed mob domination of a courtroom, mental coercion of a defendant, a judicial system which does not provide disinterested judges, and discriminatory selection of jurors.

Bridges v. California, 314 U.S. 252, 282 (1941) (citations omitted); *see also* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083-92 (1996).

Judges cannot fulfill this constitutional mandate if they have a personal stake in the outcome of a case. Most obviously, a judge who has a "direct, personal, substantial, pecuniary interest in reaching a conclusion" in a case cannot provide due process. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Less direct interests, too, will interfere with a person's right to an impartial tribunal:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold

> the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id. at 532; *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (holding that due process required disqualification of state supreme court judge in case that could have affected judge's personal litigation); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (finding that mayor responsible for village finances could not serve as judge in a court collecting fines that generated village income); *In re Murchison*, 349 U.S. 133 (1955) (concluding that due process does not permit same judge both to act as grand jury and to preside at trial of the accused).

The states' interest in guaranteeing due process includes eliminating not only actual bias but also the appearance of bias. "The Due Process Clause 'may sometimes bar trial by judges who . . . would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Aetna Life Ins.*, 475 U.S. at 825 (quoting *Murchison*, 349 U.S. at 136). Consequently, states may "properly protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965); *see also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) ("*Letter Carriers*") ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it."); *United States v. Microsoft Corp.*, 253 F.3d 34, 111-17 (D.C. Cir. 2001) (*en banc*) (ordering disqualification of judge for "destroy[ing] the appearance of impartiality," even without evidence of actual bias, and emphasizing the

importance of "public confidence in judicial impartiality"), *cert. denied*, 70 U.S.L.W. 3267 (2001); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("[T]he state's interest in ensuring that judges be *and appear to be* neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." (emphasis added)).

B. Minnesota's Decision to Use an Electoral Selection Process Does Not Lessen Its Compelling Interest in an Impartial Judiciary.

The choice of an elected over an appointed judiciary is simply a decision concerning who selects and removes judges, not a value choice about the role of judges under our constitutional system or the need to maintain an impartial judiciary. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Mode of appointment is only one factor that enables distinctions to be made among different kinds of public officials."). An elected judiciary can and must be as impartial as an appointed judiciary.

As is fitting for a federal system, the states have chosen an array of judicial selection processes. Only eleven rely primarily on appointment. Nineteen utilize retention elections for some or all judges. Sixteen states have at least some partisan elections, while twenty have at least some that are non-partisan. *See* Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 1, 45; *see also* American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (visited Feb. 18, 2002) http://www.ajs.org/Judicial%Selection%20/Charts3.pdf. In total, fifty-three percent of state appellate judges and seventy-seven percent of state trial judges are selected or retained through contestable elections. Only thirteen percent face no elections

at all. *See* Schotland, *supra*, at 4-5. The Due Process Clause compels all states, however, to provide their citizens with fair and impartial judges, regardless of the method of selection.

Minnesota's own commitment to both an elected and an impartial judiciary confirms that an electoral selection process need not diminish the preeminent goal of independent judges. As the Minnesota Supreme Court has observed:

> The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible to allow judges to decide cases without those influences.

Peterson v. Stafford, 490 N.W.2d 418, 420 (Minn. 1992).

As part of that commitment, Minnesota adopted its first canon regulating the speech of judicial candidates in 1950. *See Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 879 (8th Cir. 2001). Most recently, the Minnesota Bar Association, the District Judges Association, and the Conference on Chief Judges have expressed support for Minnesota's strict limits on candidate speech because of concern that reducing the restrictions would further politicize elections. *Id.* at 880.

Minnesota moderates the effect of elections on the judiciary by giving judges a six-year term; requiring judicial elections to be non-partisan; utilizing appointment to fill vacant seats; permitting appointed judges to serve for at least a year before facing an election; designating incumbents on

the ballot; and carefully regulating the conduct of judicial candidates. *See Republican Party*, 247 F.3d at 865-66 (discussing *Peterson* and Minnesota's history of judicial elections); *Peterson*, 490 N.W.2d at 420-25. All of these steps reflect Minnesota's commitment to balancing ultimate democratic oversight with the judicial independence necessary for impartiality.

II. States' Compelling Interests in a Fair and Impartial Judiciary Justify Imposing Speech Restrictions on Judicial Candidates.

A. Judges Differ from Other Elected Officials in Fundamental Respects.

Because of the constitutional obligation of judges to apply the law impartially, states that use an electoral selection or retention process must regulate that process in ways that do not apply to other elected officials. Judges differ from other elected officials both in what they do and in how they do it. These differences justify prohibiting judicial candidates from announcing in advance their positions on issues that are likely to come before them on the bench.

Most elected officials, and particularly legislators, are advocates for their constituents. Their function is to take action on behalf of those constituents through their power to make and change the law. When taken, that action affects the citizenry as a whole, and is intended to reflect the will of the majority.

In contrast, judges are first and foremost the arbiters of individual disputes. They cannot be advocates for either side in a lawsuit but rather must be neutral toward every litigant before them. Moreover, when constitutional rights

are at stake, judges represent a critical anti-majoritarian force that balances the political power of the majority.

Political officials and judges go about performing these different functions in dramatically different ways. Legislators typically act as part of large deliberative bodies. They also routinely contend with elected executive officials, and executives with legislative officers. Political reality forces compromise between representatives with diverse interests in order to take action. Within these limits, however, political officials can take on any topic and debate any point. Indeed, vigorous debate of disputed issues both between and within the legislative and executive branches is intended to promote comprehensive consideration of the public interest and is constitutionally protected. *See, e.g.*, U.S. CONSTITUTION, Art. I, § 6 (the Speech and Debate Clause). Moreover, political officials and their constituents can approach one another at any time to exchange views.

Judges, on the other hand, act individually or in only the smallest of groups. Their reach properly extends only to the issues that parties bring before them in the context of an individual lawsuit. "A trial is not a 'free trade of ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'" *Bridges*, 314 U.S. at 283 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919)). Instead, judges are bound to resolve cases in accordance with the "rule of law." In other words, judges must apply:

> a continuity of reasoned principle found in the words of the Constitution, statute, or other controlling instrument, in the implications of its structure and apparent purposes, and in prior judicial precedents, traditional understanding,

> and like sources of law. A legislature may draw arbitrary lines according to practical politics and the pressures of interest groups. A decision "according to law," however, implies a generality of principles binding the judges and applied consistently to all persons of yesterday, today and tomorrow.

Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566-67 (1996); *cf.* Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?* JUDICATURE, Sept.-Oct. 2000, at 1, 3 ("Since vigorous disputes exist over which theory of interpretation is best, a judge is often free to choose among several generally accepted alternatives. A judge is not free, however, to invent an idiosyncratic theory of interpretation with no roots in our judicial traditions or to decide cases according to personal whim.").

Judges are further separated from political officials by their focus on the rights of individuals rather than the will of the majority. State judges, just as much as federal, are sworn to uphold the United States Constitution and the limitations on majority power embodied within it. They must also enforce the additional rights granted by the states to their citizens, regardless of prevailing community sentiments. As Alexander Hamilton explained during the ratification debates:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority . . . . Limitations of this kind can be preserved in

> practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST NO. 78 at 497 (Robert Scigliano, ed., 2000).

Madison likewise recognized this essential role of independent judges in a constitutional system. When introducing the Bill of Rights to the first Congress, Madison linked the security of those rights to an impartial judiciary:

> Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 ANNALS OF CONG. 457 (Joseph Gales, ed., 1789) (reprinted in THE MIND OF THE FOUNDER 224 (Marvin Meyers, ed., 1973)). Thus, when judges are faced with a decision between the prevailing sentiments of the public and an individual constitutional freedom, they must reject the majority view and uphold the constitutional liberty.

This Court, too, has always upheld the importance of the anti-majoritarian component of the judicial function: "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to vote; they depend on the outcome of no elections.*" *West Virginia State*

Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added). The anti-majoritarian role of judges in protecting constitutional freedoms therefore requires them to operate with an independence from their constituencies that the political branches need not always maintain.

B. The Distinctive Purposes and Processes of the Judiciary Require Speech Restrictions in Judicial Campaigns.

Political officials are elected to effectuate the interests of their constituencies. They can and should advocate particular positions during their campaigns because that is also their role in office. But this is emphatically not the role of judges, whose duty is to provide due process and preserve constitutional liberties by applying the law impartially to all litigants. Thus, while the constitutional interest in unrestricted speech is never more vital than in the electoral process for legislators and executives, this principle does not apply with the same force to judges because of their different role.

Consequently, states can properly limit the conduct of judicial campaigns in ways that would be improper for other elections. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d at 228 ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."). For a prospective judge to campaign by announcing positions in advance on disputed issues likely to come before the court is inconsistent with the obligation of a judge, once on the bench, to apply the law impartially to each individual litigant on the specific facts of each individual case.

> Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind. For example the contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office.

Morial, 565 F.2d at 305.

Thus, judges who stake out positions in advance through public announcements on issues likely to come before the bench necessarily risk the impartiality that judging demands. Even if most judges can overcome this risk, due process requires that "justice must satisfy the appearance of justice" as well as the reality. *Aetna Life Ins.*, 475 U.S. at 825. Consequently, states may prohibit judicial candidates from announcing their positions on disputed issues likely to come before them if they win election in order to preserve both the reality and the appearance of judicial impartiality.

III. The Role of Money in Modern Elections Makes Restrictions Such as Minnesota's Announce Clause Essential to Preserve Judicial Impartiality.

A. The Role of Money and Fund-Raising in Judicial Elections Is Increasing.

The biggest threat to judicial independence and impartiality in states with elected judges comes from the increasing role of money in modern judicial elections. Candidate fund-raising increased threefold from 1990 to 2000. *See* Schotland, *supra*, at 2, 13-14. The funds raised by judicial candidates in 1998 and 2000 exceeded the total spending in elections from 1990 to 1996. Candidates for state supreme court seats raised more than $45 million in 2000, a 60% increase over the previous record set in 1998. In just the five states with the most hotly contested seats, outside individuals and organizations poured in at least another $16 million in 2000. *See id.*

A review of the most expensive judicial elections in 2000 shows the pervasive power of money. In Alabama, which had the most costly judicial elections, thirteen candidates for five seats on the state supreme court spent more than $13 million, with at least another $1 million spent by outside groups. *See id.* at 17-19. In Michigan, candidates for the supreme court spent more than $7 million, to which organizations and other supporters added more than $6 million. *See id.* at 24-25. In Ohio, supreme court candidates raised $3 million. Noncandidates spent nearly three times that much, much of it for so-called issue ads. *See id.* at 26-27. Illinois had the most expensive race in the country in terms of dollars per vote: candidates in one supreme court primary spent more than eleven dollars campaigning for each vote cast. *See id.* at 46.

As the amount of money spent in judicial elections has increased, poll after poll has shown that large, private contributions to judges undermine at least the appearance of neutrality, while expensive television attack ads run by interest groups in judicial elections heighten concerns that justice is for sale. A nation-wide poll conducted by Greenberg Quinlan Rosner Research and American Viewpoint for the Justice at Stake Campaign in 2001 found that seventy-six percent of voters believe that campaign contributions influence decisions. *See* National Public Opinion Survey Frequency Questionnaire at 4 (visited Feb. 18, 2002) http://www.justiceatstake.org/files/JASNational SurveyResults.pdf. Two-thirds of all voters believe that litigants who have made campaign contributions to judges often receive favorable treatment. *See id.* at 7 A similar poll in 1999 found that eighty-one percent of the public thinks that political considerations influence judge's decisions, and seventy-eight percent believe that elected judges are influenced by having to raise campaign funds. *See* National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (visited Feb. 18, 2002) http://www.ncsc.dni.us/ptc/ptc.htm.

B. The Need for Money Provides Incentives for Judicial Candidates to Make Statements that Undermine Neutrality.

With some judicial campaigns now costing millions of dollars, and with costly noncandidate-funded issue ads having increasing impact, elected judges cannot ignore the vital role of fund-raising in attaining and retaining judicial office. Judges do not need to look beyond their courtrooms for the largest contributors to judicial campaigns: the lawyers and litigants who appear before them. *See* Deborah Goldberg, *et al.*, THE NEW POLITICS OF JUDICIAL ELECTIONS

9 (2002) (visited Feb. 18, 2002) http://www.justiceatstake.org/files/jasmoneyreport.pdf (providing results of an analysis of eleven states).

Many judges are acutely aware of the role of money in judicial elections. A 2001 nation-wide survey of state judges found that more than a quarter believe that campaign contributions have at least some influence on judicial decisions. *See* Justice at Stake National Survey of Judges Frequency Questionnaire at 5 (visited Feb. 18, 2002) http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf. Nearly three quarters expressed concern that, in some states, nearly half of all supreme court decisions involve at least one party who has given money to at least one of the justices hearing the case. *See id.* at 9. Forty-six percent of state court judges feel pressure to raise money during election years. *See id.* at 3.

The easiest way for a candidate to raise money is to make herself attractive to the most likely sources of funds. The easiest way for a candidate to make herself attractive to these funding sources is to make statements consistent with their interests. Certainly, prospective supporters can look at a candidate's background or judicial record in an attempt to determine which candidate to support. But potential newcomers to the bench may not have much record available for assessment, and even established judges—bound, as they are, to apply the law neutrally to the facts before them—may not have records that appeal clearly to potential campaign contributors. Consequently, candidates faced with the need to raise funds may feel they have little choice but to confirm their loyalty to particular positions in campaign statements.

Judges quickly learn the importance of tying themselves to the "right" public positions, and the hazards of

being connected with the "wrong" ones. The politics of the death penalty provide striking examples. Former judge Charles F. Baird of the Texas Court of Criminal Appeals, who lost an election in 1998, reports that "the answer to the question whether capital cases make a difference in judicial elections is a clear and resounding Yes." *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?* 31 COLUM. HUMAN RIGHTS L. REV. 123, 134 (1999) (edited transcript of panel discussion at 1999 ABA Annual Meeting). Consequently, "a lot of judges in Texas . . . have just switched parties," because the Republican party "is viewed as being a political safe haven. When a judge leaves the Democratic party and joins the Republican party, he typically does so by asserting, 'I'm tougher on crime than anybody else.'" *Id.*

One member of the Texas Court of Criminal Appeals was elected after using a stump speech in which she declared, "'If you elect me I will never, ever vote to reverse a capital murder case.'" *Id.* By 1999, she had "sat on about 250 capital cases; she ha[d] not voted yet to reverse in a single capital murder case." *Id.* The single issue of the death penalty has had similar impact elsewhere. In Tennessee, former supreme court Justice Penny White became the first Tennessee judge ever to lose a retention race after she voted to reverse a death sentence. *Id.* at 140. On the day of the election, the Tennessee governor commented: "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so." *Id.* The Tennessee Supreme Court now issues press releases when it affirms a death sentence. *Id.*

Of course, if judges announce positions while campaigning, they may also feel compelled to look over their

shoulders to what they said during the last election in considering how to rule on a case. Faced with subsequent elections in order to retain their jobs, candidates can put their jobs at risk if they do not live up to their publicly declared views while on the bench. A candidate who campaigns as "tough on drunk drivers" would be hard pressed to enter a ruling rejecting a state's sobriety tests as unreliable, regardless of the evidence. *See In re Disciplinary Proceeding v. Kaiser*, 759 P.2d 392 (Wash. 1988) (censuring judge who campaigned as "tough on drunk driving"); *compare Mack v. Cruikshank*, 196 Ariz. 541 (Ariz. App. 1999) (holding that state had violated due process rights of defendants by using unreliable breath-testing device).

This is exactly the sort of incentive toward particular positions that has no place in the judiciary. A decision by an arbiter who has a personal interest in the decision is incompatible with due process. Judges plainly have an interest in retaining their jobs. To the extent that a judge feels bound to uphold a position that the judge announced in order to win election, a litigant is denied fair and impartial treatment. Historically, courts recognized that "the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." *Tumey*, 273 U.S. at 524. Nor is the partiality that offends due process limited to pecuniary interests. *See Aetna Life Ins.*, 475 U.S. at 830 (Brennan, J., concurring) ("an interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding"); *Murchison*, 349 U.S. 133 (finding due process violation because of likelihood of non-pecuniary bias). Whether or not job security is a pecuniary interest, it is certainly a

personal interest that has no place in judicial decision-making.

Judicial candidates who announce positions in order to raise money to further their campaigns threaten neutrality in more subtle ways, as well. Psychological research establishes that speakers become attached to their positions merely by speaking them. *See* Neil K. Sethi, Comment, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. PA. L. REV. 711, 721-22 (1997) (citing Nicky Hayes, FOUNDATIONS OF PSYCHOLOGY (1994); Jerome Kagan & Julius Segal, PSYCHOLOGY: AN INTRODUCTORY TEXT (6th ed. 1988); B. von Haller Gilmer, PSYCHOLOGY (2d ed. 1973)). Simply taking a position can be enough to change attitudes. *See* Sethi, *supra*, at 722. Moreover, once attached to a position, the human mind tends to reject or rationalize new information so that it conforms to the pre-formed belief. *See id.* at 721. Thus, the judicial candidate who makes a series of speeches establishing a position becomes increasingly unlikely to deviate from that position regardless of the particular laws or facts before her.

In *Murchison*, the Court was mindful of the tendency of the individual to become attached to views previously formed or expressed. There, the Court found that a single judge could not, consistent with due process, act as both "grand jury" and trial judge. Having once taken a position on the state's case, "a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. . . . As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand jury' secret session." *Murchison*, 349 U.S. at 137-38.

The same is true of judicial candidates who announce positions on issues they may have to decide. Having once taken a position on how those issues ought to be handled or resolved, a judge cannot be "wholly disinterested" in the outcome. Nor can judges free themselves from the influence of proclaiming positions to thousands of voters when an individual case presents an opportunity to adhere to, or deviate from, that position. Due process cannot coexist with campaign statements announcing positions on issues likely to come before the court.

C. Because States Are Limited in Their Ability to Regulate Money in Elections, Other Means of Protecting Fair and Impartial Courts Are All the More Important.

Buckley v. Valeo severely limits the ability of states to address the role of money in elections. *See* 424 U.S. 1 (1976). The extent to which *Buckley* does or should apply to judicial elections has not been resolved. As discussed above, judicial elections invoke different state interests than do elections for legislators and executives. That difference compels a different First Amendment analysis of campaign finance restrictions in state judicial elections than the *Buckley* Court developed when analyzing the Federal Election Campaign Act.

Despite these differences, states and lower courts are reluctant to deviate from the standards the Court has established for finance limitations in other elections when considering restrictions on judicial elections. *See, e.g., Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1998) (refusing to differentiate between judicial elections and campaigns for legislative or executive office). As long as states are limited in their ability to regulate campaign

spending directly, they must be free to regulate related aspects of judicial campaigns that are tied to the role of money. First among these should be the ability of states to restrict judges from taking positions that appeal to particular constituents and therefore particular sources of funds, and that appear to tie a judge to a particular position regardless of the law or the facts as they may arise in an actual case.

IV. As Construed, Minnesota's Announce Clause, Like Canon Five of the 1990 ABA Model Code of Judicial Conduct, Is Constitutional.

A. The Courts Below Properly Construed the Minnesota Announce Clause as Consistent with ABA Canon Five.

As written, Minnesota's Canon Five prevents a judicial candidate from "announc[ing] his or her views on disputed legal and political issues." P. App. at 133A-134a. In comparison, Canon Five of the 1990 version of the ABA Model Code of Judicial Conduct states that judges and judicial candidates shall not:

> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or
>
> (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

The courts below construed Minnesota's Announce Clause as substantially the same as clause ii of the ABA Model Code. The Minnesota Supreme Court has now expressly adopted the same construction. *See In re the Code of Judicial Conduct*, C4-85-697, 2002 Minn. LEXIS 42 (Minn. Jan. 29, 2002). In doing so, the courts correctly adopted a narrow construction that sustains the Minnesota provision.[3]

All of the parties and *amici* in this case agree that judges should not make explicit promises or commitments to decide particular cases in a particular manner, and that judges should not knowingly misrepresent facts (clauses i and iii of the ABA's Canon Five). Further, all agree that voters require general information from which to make informed choices about judicial candidates.

Controversy exists only as to the ability of judicial candidates to announce positions on controversies or issues that are likely to come before the court. Because such announcements in the context of an electoral campaign inherently carry at least the appearance of a commitment to decide a case or class of cases in a particular manner, the Minnesota Announce Clause is properly construed to be congruent with clause ii of the ABA Model Code. Thus, a candidate may discuss her legal and judicial philosophy generally, as long as she does not commit or appear to be

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[3] Thus, the issue of whether the courts below erred in construing Minnesota's Canon 5 narrowly, *see Republican Party Brief* at 26-29, has now been resolved. This Court is bound by the Minnesota Supreme Court's decision in *In re the Code of Judicial Conduct* "that the announce clause of Canon 5(A)(3)(d)(i) shall be enforced in accordance with the interpretation of that clause by the United States Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001)." *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute.").

committing herself to decide a case or class of cases in a particular manner.

Minnesota's Board on Judicial Standards has shed light on the intent behind the Minnesota Announce Clause, in a manner consistent with the ABA Model Code. The Board has opined that judicial candidates may comment on appellate decisions and has provided lists of questions on topics that judicial candidates can address without violating the canon, such as judicial philosophy, issues relating to the administration of different types of cases, and the proper role of a judge in the judicial system. *See Republican Party*, 247 F.3d at 882. Of course, judges can also discuss their experience and qualifications. All of these are meaningful subjects that do not require the judge to present a position on a disputed legal or factual issue likely to come before the court.

B. As Construed, the Announce Clause Is Not Unconstitutionally Vague.

The Announce Clause prohibits judicial candidates from announcing their positions on disputed issues likely to come before a court, but does not prohibit candidates from making general statements on legal and judicial philosophy. This standard is not unconstitutionally vague.

The void-for-vagueness doctrine is aimed at regulations that leave individuals unable to determine what conduct is and is not prohibited, and that permit law enforcement officials to engage in arbitrary enforcement. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Minnesota's Canon Five avoids these concerns. In addition to the plain language of the Minnesota provision and of Canon Five of the ABA's Model Code, the Minnesota Board

of Judicial Standards has issued formal opinions regarding the scope of the canon as well as examples of permissible and impermissible questions and comments that may arise in judicial campaigns. *See Republican Party*, 247 F.3d at 882. All of these interpretive standards lend clarity to the canon and must be considered in the vagueness analysis. *See Letter Carriers*, 413 U.S. at 575 ("It is to these regulations purporting to construe § 7324 as actually applied in practice, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad.").

Moreover, the Minnesota Board provides advisory opinions to judicial candidates who have questions about specific statements. Indeed, this case followed just such an opinion. *Republican Party*, 247 F.3d at 859. The ability of candidates subject to the canon's prohibition to obtain specific guidance from the Board further eliminates any vagueness concerns. *See Letter Carriers*, 413 U.S. at 580 ("It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.").

In any event, vagueness analysis is typically limited to criminal statutes. *See Kolender*, 461 U.S. at 357 ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness . . . ."). The danger of vague regulations in the criminal context is particularly severe because a state's failure to provide "'minimal guidelines to govern law enforcement' . . . may permit 'a standardless sweep [that] allows policemen, prosecutors and juries to pursue their

personal predilections.'" *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974), and describing the need for adequate guidelines for law enforcement as "the most meaningful aspect of the vagueness doctrine").

Here, not only is Canon Five not a criminal statute, but the Minnesota Board of Judicial Standards has applied Canon Five with reserve and precision. There is no evidence in the record of any arbitrary enforcement of Canon Five or that any candidate subject to its limitations has been unable to ascertain what speech is and is not prohibited. Finally, vagueness should be analyzed in light of the class of speakers subject to a regulation. Although drawing the line between permissible and impermissible comments may require fine judgment and an appreciation of the reasons for the rule, these are precisely the qualities that we can properly demand of a judge.

C. The Announce Clause Strikes an Appropriate Balance Between the Role of an Impartial Judiciary in Affording Due Process and the First Amendment Rights of Candidates and Voters.

Because the states' compelling interest in an impartial judiciary itself arises from constitutional interests, the Court should not presume unconstitutionality but rather should balance the two constitutional interests involved. The careful weighing of constitutional concerns is particularly appropriate in the electoral arena. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 399 (2000) (Breyer, J., concurring). Like *Nixon*,

> this is a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny." Nor can we expect that mechanical application of the tests associated with "strict scrutiny"—the tests of "compelling interests" and "least restrictive means"—will properly resolve the difficult constitutional problem that campaign finance statutes pose.

Nixon, 528 U.S. at 400 (Breyer, J., concurring).

Consequently, the Court should balance the competing interests rather than simply subject Minnesota's Announce Clause to the categorical rubric of strict scrutiny. On one side of the scale sit the free speech rights of judicial candidates and the corresponding right of access to their views held by the public. On the other sit the due process rights of litigants and the dangers posed by both the reality and the perception of a judiciary tainted by prejudgments and partiality. Thus, the Court should ask "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the other." *Id.* at 402. As part of that inquiry, the Court should defer to bodies with "significantly greater institutional expertise." *Id.*

Here, Minnesota's Canon Five was promulgated and interpreted by the Minnesota Supreme Court as part of Minnesota's commitment to both an elected and an impartial judiciary. The Minnesota Supreme Court has deep institutional experience with the problems posed by an electoral judicial selection process. Minnesota's solution

should be upheld in light of the threat to due process posed by the speech barred by the Announce Clause.

D. The Announce Clause Is Also Narrowly Tailored.

The Announce Clause, properly construed, also passes constitutional muster under the traditional test of strict scrutiny. No less restrictive alternative would serve the states' compelling interests in the impartiality and the appearance of impartiality in their judiciaries.

Statements by judicial candidates that indicate how they will decide issues likely to come before the court create at least the appearance that the candidate is offering rulings in exchange for votes. Judicial candidates who make such statements while trying to attract campaign contributions risk creating the even more damaging appearance that the candidate is offering rulings in exchange for money. Even these appearances are inherently corruptive of the role of the courts in affording due process.

Permitting judges to "announce" their positions also gives judicial candidates an incentive to make such "offers." If one candidate in a judicial race announces a position on a disputed issue, any rival would face the choice of joining in that position, adopting an appealing counterposition, or losing support. Such competing announcements would foster the election of the candidate who most successfully convinces the voters that he or she would rule the way most people want. A system that pressures judges to announce their positions in order to be elected would conflict with the duty of judges to decide each case impartially on its own merits, blur the distinction between the judicial and political branches, and could result in the selection of those

candidates best able to reflect contemporary voter preferences rather than those best qualified to serve as judges.

Announce clauses are essential to limit these dangers. None of the supposedly less restrictive alternatives proposed by petitioners would protect the states' interests. The Republican Party Petitioners propose an appointment system and life tenure as alternatives to a restraint on judicial campaign speech. *Republican Party Brief* at 37-39. The Minnesota Constitution, however, requires an elected judiciary. The "least restrictive alternative" test does not require a state fundamentally to alter its government, particularly as the right of the people of Minnesota to determine the manner of selection of their judiciary is itself an interest of constitutional magnitude under our federal system. *See Gregory v. Ashcroft*, 501 U.S. 452, 457-64 (1991) (construing the Age Discrimination in Employment Act narrowly to avoid a conflict with the constitutional interests of the states in determining the qualifications of their judges).

Moreover, "announce" restrictions would be appropriate even in appointment systems. The predetermination of issues by judges, or the appearance thereof, threatens due process regardless of whether the judge is elected or appointed. Federal nominees recognize the impropriety of such announcements when they decline to answer issue-specific questions during the confirmation process.

The Republican Party Petitioners also suggest a restriction prohibiting judges from making promises or pledges of specific conduct while in office as a less restrictive alternative. *Republican Party Brief* at 37. Such a

restriction, however, would reduce none of the pressures on an impartial judiciary created by position announcements, as discussed above. A definite statement of position ties a judge to that position, both in fact and in the minds of the public, regardless of whether it is followed by a promise to adhere to that position in the future.

Finally, Petitioners suggest that judges can recuse themselves in cases where their impartiality may be at issue. *Republican Party Brief* at 38. However, if recusal were the answer to questions of impartiality, a vigorous campaign could leave a judge ineligible to hear a wide variety of cases. Nor does recusal address the problems of public perception generated by judicial candidates who violate announce clauses. The First Amendment does not require a state to adopt illogical and unworkable rules.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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APPENDIX

The **Brennan Center for Justice at NYU School of Law** unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system. Through its Judicial Independence Project, the Center works to protect the judiciary from politicizing forces, including the undue influence of money on judicial elections and efforts to relax canons on judicial conduct that help to safeguard crucial differences between judges and officers of the political branches. The Center takes an interest in this case because of its important implications for the ability of states with elected judiciaries to maintain both the reality and appearance of impartiality in their courts.

Founded in 1913, the **American Judicature Society** is a national, non-profit organization with members who are judges, lawyers, and lay people dedicated to improving the administration of justice. It is funded through members' dues, contributions, and grant funds for special projects. For 89 years, the Society has been the foremost national organization speaking with a credible and independent voice on administration of justice issues and has demonstrated a continuing commitment to high ethical standards for judges and judicial candidates. The Society's Center for Judicial Independence promotes a judiciary that is free to issue fair and just rulings without bowing to popular and political pressures. Its Elmo B. Hunter Citizens Center for Judicial Selection promotes judicial selection reform to ensure a bench of the highest quality. Through its Center for Judicial Ethics, the Society provides a forum for the exchange of information and promotes the enforcement of judicial ethics standards designed to promote confidence in the judiciary.

Promoting high standards of conduct in judicial election campaigns has always been one of the focuses of the Center because public confidence in a judge's decisions is based not only on what takes place on the bench but also on how the judge campaigned for the office.[4]

Campaigns for People promotes non-partisan campaign finance and ethics reform in Texas. The organization supports state judicial reforms in Texas that enhance judicial independence, including judicial codes of conduct and public financing of judicial campaigns. It takes an interest in this case because of its implications for Texas' ability to maintain both the reality and appearance of impartiality in its courts.

Citizen Action/Illinois is the largest consumer watchdog group in Illinois. It has been a key player in legislative battles for consumers at the state and national levels. It believes that fair and impartial courts are essential to the preservation of our legal system and our liberty. Citizen Action/Illinois takes an interest in this case because of its important implications for the ability of states with elected judiciaries, like Illinois, to maintain both the reality and appearance of impartiality in their courts.

Kansas Appleseed Center for Law and Justice is a nonpartisan charity that advocates for improvements in the state government and legal system so that all Kansans will have equal access to justice. Kansas Appleseed Center for

[4] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Judicature Society. No inference should be drawn that any judge-member of the Society's executive committee has participated in the adoption of or endorsement of the positions in this brief, which was not circulated to any judge-member of the executive committee prior to filing.

Law and Justice takes an interest in this case because of its implications for the Kansas Supreme Court Rules, which contain safeguards against promises made by judicial candidates that are similar to those at issue in this case.

The **North Carolina Center for Voter Education** is a non-partisan, not-for-profit organization dedicated to improving the quality and responsiveness of our election system. By examining current systems of campaign finance and election laws, and by promoting research and public discussion about the electoral process, the Center hopes to raise citizen awareness, make the election process more inclusive, and increase participation in elections. The Center takes an interest in this case because of its important implications on how states that elect their judiciaries, such as North Carolina, attempt to reduce the worrisome influence of money and politics over judicial selection.

Protestants for the Common Good is an association of Protestant laity and clergy throughout Illinois that calls people of faith to consider the ways in which their beliefs relate to public life. It believes that citizens must have confidence that decisions made by the judicial branch of government are impartial and independent of any factors not related to the applicable law. Protestants for the Common Good, which has recently focused attention on the increasing sums of money that are being raised and spent by judicial candidates, takes an interest in this case because of its implications for Illinois' ability to maintain both the reality and appearance of impartiality in its courts.

The Reform Institute is a not-for-profit educational organization that focuses on campaign finance and election reform issues. The Reform Institute seeks to protect judicial elections from the abuses that have long plagued our federal

campaign finance system—special interest spending and issue advocacy campaigns. The Reform Institute takes an interest in the *Kelly* case because the canon at issue helps to protect courts from the corrupting influences of large campaign contributions and to distinguish judicial campaign statements from issue advocacy campaigns run against judicial candidates.

Wisconsin Citizen Action is a public-interest organization of 60,000 members committed to economic justice and democracy. Wisconsin Citizen Action believes that the rising tide of special-interest funding of state-level supreme court elections is washing away public trust in the impartiality of justice. Wisconsin Citizen Action takes an interest in this case because, with the ability to raise large amounts of money increasingly becoming a *de facto* qualification for a supreme court candidacy in Wisconsin—as in many other states—it is more vital than ever to retain strong protections in judicial codes of conduct against candidates pandering to partisan or special interests.

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In the
Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

VERNA KELLY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE MINNESOTA STATE BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Minnesota State Bar Association (MSBA) is a non-profit corporation of attorneys licensed to practice law in the State of Minnesota. For its mission, the MSBA seeks to

> aid the courts in the administration of justice; apply the knowledge and experience of the profession to the public good; maintain in the profession high standards of learning, competence, ethics, and public service; . . . provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and to publish information relating thereto . . . , [a]ll . . . to more effectively discharge the public responsibility of the legal profession.

Restated MSBA Articles and Bylaws (July 1992).

Precisely this mission brings the MSBA to this Court.[1] The MSBA believes that the "Announce clause" of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, as construed by the Eighth Circuit Court of Appeals

- serves the compelling state interests of Minnesota in preserving both the impartiality and the appearance of impartiality of its non-partisan judiciary

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[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 37.3. Pursuant to Rule 37.6, the MSBA certifies that no one other than the MSBA and its counsel authored this brief in whole or in part or contributed monetarily to its preparation or submission.

- by a means reasonably necessary and narrowly tailored to achieve Minnesota's interests fully, practically, and effectively.

This Court's affirmation of the Announce clause, as construed by the Eighth Circuit, is of particular interest and importance to the MSBA for three reasons. First, the MSBA represents the vast majority of attorneys who actively practice law in Minnesota; thus, its members—and their clients—depend daily on a state judiciary whose impartiality and appearance of impartiality the Announce clause strives to protect. In addition, the MSBA's membership includes most of the successful and unsuccessful candidates for judicial office—including Petitioner Gregory F. Wersal during some of his judicial campaigns; thus, MSBA-member judges and judicial candidates also benefit from the impartiality and appearance of impartiality afforded by the Announce clause. Finally, the MSBA played a prominent role in studying Minnesota's judicial election process after the 1996 elections; thus, it holds a unique perspective on the history, interpretation, application, and continued desirability of the Announce clause.

STATEMENT OF THE CASE

Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct provides that,

> [a] candidate for a judicial office, including an incumbent judge, shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; *announce his or her views on disputed legal or political issues*; or misrepresent his or her identity,

> qualifications, or present position or other fact, or those of the opponent.

52 Minn. Stat., Code of Jud. Conduct, Canon 5(A)(3)(d)(i) (italics added and hereinafter called "the Announce clause").

Against First Amendment challenge by Petitioners, the Eighth Circuit Court of Appeals construed the Announce clause to preclude candidates only "from publicly making known how they would decide issues likely to come before them as judges." *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 881-82 (8th Cir. 2001). So construed, the Eighth Circuit held that the Announce clause is a narrowly tailored limitation on campaign speech that serves a compelling state interest in maintaining "an independent and impartial judiciary" and an "equally important interest in preserving public confidence in that independence and impartiality." *Kelly*, 247 F.3d at 867, 877-82.

The Minnesota Supreme Court recently affirmed the Eighth Circuit's construction of the Announce clause. Further, it ordered the Board on Judicial Standards ("BOJS") and the Lawyers Board of Professional Responsibility ("LBPR"), which have primary responsibility for applying Canon 5, to enforce the Announce clause "in accordance with the interpretation of that clause by the United States Court of Appeals for the Eighth Circuit." *See* Order, *In re the Code of Judicial Conduct*, No. C4-85-697 (Minn. S. Ct. Jan. 29, 2002).[2]

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[2] This Order should put to rest Petitioners' claim that the Eighth Circuit misconstrued the Announce clause under Minnesota law and their fear that the BOJS and the LBPR might not enforce the Announce clause as the Eighth Circuit construed it. *See* RPM Brief at 28-29.

SUMMARY OF ARGUMENT

Preserving both the impartiality and the appearance of impartiality of state court judges is an "undeniably compelling" governmental interest of "the highest order". So held the Eighth Circuit. *See Kelly*, 247 F.3d at 864, 876. So agreed the dissent. *Id.* at 902-03. (Beam, J., dissenting) ("The Minnesota Supreme Court has every right to . . . protect its judiciary against both actual and the appearance of partiality.") Even Petitioners now agree. *See* RPM Brief at 2 ("There is no doubt that the State has a compelling interest in assuring judicial impartiality. . . . In addition, it is legitimate for the State to regulate judicial campaign conduct and speech in various ways to ensure that they are conducted in a way that will not undermine the public perception of judicial impartiality.").

The question before this Court, therefore, is not whether Minnesota can constitutionally limit judicial campaign speech. It can—because of its compelling state interests in both the actual and the apparent impartiality of a non-partisan judiciary. The only question is whether the Announce clause goes too far in limiting judicial campaign speech—either (1) because it does not advance or (2) because it is not narrowly tailored to achieve Minnesota's compelling state interests. The Announce clause does not go too far.

1. The Announce clause advances compelling Minnesota interests in the impartiality and the appearance of impartiality of a non-partisan state judiciary.

a. However a judge chooses to rule on a "disputed legal or political" issue on which he expressed his "general

legal views" during the campaign,[3] his ruling will raise the specter of partiality. If the judge chooses to rule consistently with his campaign-expressed views, it may reasonably appear to disenchanted litigants as well as to the general public that he ruled partially—even if he did not. On the other hand, if he chooses to rule inconsistently with his campaign-expressed views, then disenchanted voters may next elect a challenger who will rule consistently with his campaign-stated views. Either way, the appearance of impartiality is compromised.

That judges take oaths does not change this fact. Even if campaign-expressed views do not subtract from a judge's impartiality, they subtract from his appearance of impartiality; indeed, in this day and age of political cynicism, they multiply the appearance of partiality. Moreover, Petitioners cannot have it both ways. They cannot demand to know during the campaign how a candidate will exercise his discretion in order to make him "accountable" to the public, yet personally believe—or expect the public to believe—that the candidate, as judge, only followed his oath when he exercised his discretion exactly as he stated he would.

b. In addition to preserving impartiality and the appearance of impartiality, the Announce clause is critical to

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[3] Petitioners use various permutations of the phrase "general views on disputed legal or political issues" to define what they regard as protected judicial speech. *E.g.*, Wersal Brief at 17 ("general views on disputed legal or political issues"); RPM Brief at 4 ("general views on the law"). However, Petitioners' use of that phrase should not be confused with similar language appearing in the Announce clause. When the Announce clause refers to such views, it means only those "issues likely to come before the court." Thus, when the MSBA argues against permitting "general views on disputed legal or political issues," as Petitioners use that phrase, it is not simultaneously criticizing similar language in the Announce clause whose meaning is much different and narrower under the Eighth Circuit's construction of the clause.

protecting Minnesota's compelling interest in non-partisan judicial elections. Partisan overtones would become much stronger, if not prevalent, in judicial elections but for the Announce clause. By Petitioner Wersal's own admission, political party endorsements would become much more frequent if a judicial candidate could declare his "general views on disputed legal and political issues." *See* Wersal Brief at 8, 9 (claiming that the Republican party would have endorsed his candidacy but for the fact that it did not know his "general views on disputed political or legal issues"). In addition, the canon that bars candidates from seeking political endorsement would become practically meaningless without the Announce clause; the candidate need only declare his "general views on disputed legal or political issues" and let the party machinery do the rest. Similarly, the canon barring candidates from attending and speaking at party conventions and political gatherings would be gutted because the candidates could simply make their views known outside the convention and watch (even if not encourage) supporters carry the message to the party faithful. In the same manner, the canon barring party identification would no longer matter because, even if the candidate does not declare himself a Republican or Democrat, the public would know or presume his affiliation from the literature and efforts of the party endorsing him. Thus, the Announce clause is a critical thread in the fabric of non-partisan judicial elections in which Minnesota has expressed a compelling interest for nearly 150 years.

c. That Minnesota has opted to elect its judges does not defeat or diminish the State's compelling interests in actual and apparent judicial impartiality and non-partisan elections. To say that Minnesota has chosen to elect its judges simply begs the question of what **type** of judicial election system did the State choose? Only if Minnesota, in choosing an election system, explicitly or implicitly chose

one that no longer valued actual and apparent judicial impartiality and non-partisan judges could it be argued that the Announce clause's limitation on judicial campaign speech does not advance a compelling state interest. However, Minnesota history (not fully recounted by the Eighth Circuit dissent or Petitioners) demonstrates just the opposite. Minnesota, to be sure, chose to elect its judges, but it simultaneously chose a non-partisan election system that was initially designed and has been repeatedly refined to protect the impartiality and the appearance of impartiality of this State's judiciary.

2. The Announce clause not only advances but advances in a narrowly tailored way Minnesota's compelling state interests.

a. The Announce clause is not overly broad. Far from a "blanket rule" against campaigning or campaign speech, the Announce clause permits judicial candidates to discuss:

- their character, fitness, integrity, education, legal experience, work habits, and ability to find facts and apply the law with impartiality—and with the appearance of impartiality. *See* Minn. Stat. § 480B.01.
- how they would handle administrative duties if elected. *See Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979).
- past appellate court decisions. *See* Minn. Bd. on Jud. Standards, Informal Op. 10/10/90.
- their judicial philosophy or general discussions of case law. *See Kelly*, 247 F.3d at 882.

- their views on a wide-ranging list of topics compiled by the Minnesota Board on Judicial Standards. *See* pp. 22-23 *infra*.

Thus, the only two personal harms that Petitioner Wersal claims—that he cannot express his judicial philosophy and criticize past Minnesota Supreme Court decisions—are groundless. Both are permitted under known interpretations of the Announce clause.

Similarly groundless are the theoretical harms claimed by Petitioners and their *amici;* namely, that the Announce clause unfairly favors incumbents who can express their philosophy and views in court opinions, which challengers cannot criticize, and/or that incumbents cannot defend their opinions. By BOJS opinion rendered some six years before Petitioner Wersal's first campaign, it has been clear in Minnesota that the Announce clause does not preclude discussion of past appellate court opinions.

Finally, to the extent that Petitioners or their *amici* muster specific examples of the "general views on disputed legal or political issues" that should be open to candidate discussion, virtually all the subjects appear on the BOJS list of topics that candidates may discuss. *Compare* pp. 22-23 *infra* (BOJS-approved list of topics) *with* ACLU Brief at pp. 17-18 and State Supreme Court Justices Brief at pp. 29-30 (listing topics that judicial candidates should be free to discuss).

b. Just as it is not overly broad, the Announce clause is not unconstitutionally vague. As construed by the Eighth Circuit and affirmed by the Minnesota Supreme Court, the Announce clause's limitation on campaign speech extends only to "issues likely to come before the court." To insist on a more precise definition—because possibly any issue could

come before a court—is to insist on more linguistic specificity than required of any other standard limiting First Amendment speech. (For example, terms such as "average person," "community standards," "prurient interest," and "social value"—which this Court uses to determine obscene material—are no more definite than "issues likely to come before the court.") That terms and definitions are situation-dependent does not make them unconstitutionally vague under the First Amendment.

Moreover, permitting judicial candidates to express their "general views on disputed legal and political issues" would be equally, if not more, vague. (What is a "general view"? When is a view not "general," or no longer general enough? When is a view not "legal" or "political"? When is it not "disputed"?) Indeed, this standard would likely require the same type of case-by-case interpretation and enforcement to which Petitioners object.

c. Finally, none of the "less restrictive means" proffered by Petitioners or their *amici* would satisfy Minnesota's compelling interests fully, practically, and effectively.

(1) Barring only "pledges or promises" would do nothing to preserve the **appearance** of impartiality of a candidate who, although making no pledges or promises, expressed views leaving little doubt about how he would rule. For example, it would require little imagination or creativity for a candidate to preface his view on any issue likely to come before the court with the disclaimer, "Although I cannot promise anything about how I would rule...." Following that type of disclaimer, the candidate could proffer very specific views raising the appearance of partiality. Only the Announce clause, by preventing end-runs on the "pledges or promises" clause also found in Minnesota's Canon 5, fully,

practically, and effectively satisfies the State's compelling interest in preserving the impartiality and appearance of impartiality of state judges.

(2) Nor does recusal offer an alternate means for fully ensuring judicial impartiality or the appearance of impartiality because recusal works only if a judge voluntarily steps aside. Moreover, recusal is a more difficult choice for a judge knowing that voters agreeing with his "general views on disputed legal or political issues" might not re-elect him for failing to rule on a case in which he could deliver on his campaign-expressed views.

(3) Nor does affording litigants the right to strike a judge without cause, *see* Minn. R. Civ. P. 63.03, fully satisfy the State interest in actual and apparent impartiality. The rule affords each party only one strike, potentially leaving a litigant at the mercy of a reassigned judge who may also have expressed campaign views on the matter at issue. In addition, the rule requires removal of a judge within 10 days of the judge's assignment, leaving no recourse if the judge first expresses views during a campaign that occurs mid-way through the litigation. Moreover, in rural areas where few (and sometimes only one) judges serve in Minnesota, striking a judge is very difficult for a lawyer who must appear regularly before that judge on dozens of other matters. Further, striking the sole judge in a Minnesota county places undue burden on other counties whose judges must hear the matter.

(4) Likewise, the right of appeal—even to a multi-judge panel—does not satisfy Minnesota's compelling interests fully, practically, or effectively. So much of what a trial judge does cannot be readily challenged on appeal. Before entry of final judgment in Minnesota, trial court rulings generally are not subject to appellate review. Even after final judgment, many rulings can be reviewed only for

abuse of discretion, and findings of fact can be reversed only if clearly erroneous. As a practical matter, these standards of review make it impossible to remedy rulings influenced—or apparently influenced—by campaign-expressed views. Moreover, if the partiality or appearance thereof arises in the court of appeals, review in the Minnesota Supreme Court would be entirely discretionary. Similarly, review by this Court would be entirely discretionary if the partiality or appearance of partiality arose due to the campaign speech of Minnesota Supreme Court justices.

(5) Ironically, a life tenure or appointment/merit selection system would afford Petitioner Wersal far less freedom of judicial campaign speech because, in a life-tenured or appointed judiciary, there would be no judicial campaigns and therefore no judicial campaign speech at all. Even if less restrictive, however, life-tenure or appointment systems would not be an "available" means to satisfy a state's compelling interests in a state that chooses to elect judges. Finally, there is no constitutional basis for requiring a state to forego an elected judiciary, in favor of a life tenure or appointment-based system, in order to preserve its compelling interest in actual and apparent judicial impartiality.

ARGUMENT

I. The Announce Clause, as Construed by the Eighth Circuit, Advances Minnesota's Compelling Interests in Both the Impartiality and the Appearance of Impartiality of a Non-Partisan Judiciary.

A. The impartiality and appearance of impartiality of a non-partisan judiciary are compelling Minnesota interests.

Preserving the independence of its judiciary is one of the highest purposes to which any government can aspire.

"[T]he law commands allegiance only if it commands respect. It commands respects only if the public thinks the judges are neutral." Bill Moyers, *Strong Warnings from the Supreme Court*, U.S. News & World Report, Nov. 29, 1999, at 36 (quoting Justice Anthony Kennedy). The clash of political interests, "[i]s fine for a legislature. But if you have that in the court system, you will then destroy confidence that judges are deciding things on the merits." *Id.* (quoting Justice Stephen Breyer).

Accordingly, the Eighth Circuit found that Minnesota has "undeniably compelling" interests "of the highest order" in preserving both the impartiality and the appearance of impartiality of its judiciary. *Kelly,* 247 F.3d at 864, 876.

Even in dissent, Judge Beam agreed. *Kelly*, 247 F.3d at 891. (Beam, J., dissenting) ("I agree that a state has an interest not only in warding off an actual breakdown of that [judicial] independence, but also the appearance of such."); *id.* at 903 ("The Minnesota Supreme Court has every right to . . . protect its judiciary against both actual and the appearance of partiality.").

So do Petitioners at last.[4] *See* RPM Brief at 2 ("There is no doubt that the State [of Minnesota] has a compelling interest in assuring judicial impartiality . . . . In addition, it is legitimate for the State to regulate judicial campaign conduct and speech in various ways to ensure that they are conducted in a way that will not undermine the public perception of judicial impartiality."); Wersal Brief at 15 (adopting RPM Brief by cross-reference).

B. That Minnesota chooses to elect its judges does not defeat or diminish the State's compelling interest in the actual and apparent impartiality of non-partisan judges.

Implicit, if not explicit, in the argument of every party or *amici* objecting to the Announce clause is the assumption that Minnesota's interest in the actual and apparent impartiality of its judiciary, although compelling, is somehow less compelling because Minnesota has chosen to elect its judges. That assumption is unfounded.

The fact that a state opts to elect its judges does not mean that it has opted to sacrifice any part of its interest in judicial impartiality. *See Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3rd Cir. 1992) ("The fact that a state chooses to select its judges by popular election . . . does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly.").

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[4] According to the Eighth Circuit opinion, Petitioners argued below that "Minnesota has no interest in the independence of its judiciary because it has chosen to make its judges stand for election." *Kelly*, 247 F.3d at 865. Before this Court, however, Petitioners concede that Minnesota has compelling interests in both the actual and apparent impartiality of its judiciary. *See* RPM Brief at 2.

Even though elected, judges remain different from legislative and executive officers in ways that continue to entitle states to limit their speech. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."); *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000) ("[T]he difference between judges and other government officials bear on the strength of the state's interest in restricting political speech."), *cert. denied*, 121 S. Ct. 77 (2000).

Accordingly, in evaluating whether the Announce clause embodies a compelling Minnesota interest, the question is not whether the State has chosen to elect its judges but instead what type of election system did it choose. Did Minnesota choose a judicial election system with all the campaign trappings of legislative and executive races? Or did it instead choose a system designed to insure that judges, although elected, remain non-partisan and maintain their impartiality and appearance of impartiality during the campaign?

The answer is clear. For nearly 150 years, Minnesota has sought to distinguish judicial from legislative and executive elections in ways that serve to protect its judiciary from partisan politics and to preserve both the impartiality and the appearance of impartiality of its elected judges.

In 1857, the original framers of the Minnesota Constitution established seven-year judicial terms so that judicial elections did not coincide with the elections for partisan offices. *See* Minn. Const. art. 6, § 3 (1857). At the same time, the framers required judges to be "learned in the law," implicitly subjecting judges to more "restrictive canons

of conduct governing the profession of law." *See Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992) (interpreting Minn. Const. art. 6, § 5 (1857)). In 1883, judicial term length was reduced to six years, presenting "difficulties associated with partisan judicial elections." *Id.* at 420. Thus in 1912, the Minnesota Legislature met in special session to pass legislation mandating non-partisan judicial elections. *See* Act of June 19, 1912, ch. 2, 1912 Minn. Laws, Spec. Sess. 4-6. In 1949, the Legislature reiterated that "[e]ach associate justice or judge is deemed to hold a separate non-partisan office." *See* Minn. Stat. § 205.82 (1950). In 1974, the Minnesota Supreme Court first adopted a code of judicial ethics designed, again, to assure non-partisan elections and to preclude political activities, except on measures to improve the law or legal system. *See* Minn. Code of Judicial Ethics (1974). In the 1980s, Governors Albert Quie (1979-1983) and Rudy Perpich (1983-1990) formed judicial selection committees to help screen candidates for gubernatorial appointment to judicial vacancies. In 1990, the Legislature recognized the wisdom of this system by permanently establishing a non-partisan Judicial Merit Selection Commission for recommending judges based not on their partisanship but on their "integrity, maturity, health if job related, judicial temperament, diligence, legal knowledge, ability and experience, and community service." *See* Minn. Stat. § 480B.01, subd. 8.

In light of this history, it should come as no surprise that the Minnesota Supreme Court would conclude, "[w]hile the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary." *Peterson*, 490 N.W.2d at 420.

In dissent, Judge Beam also recounts Minnesota history to conclude that Minnesota "opted for an elected judiciary" in 1857 and "has never since intimated a change in this policy." *Kelly*, 247 F.3d at 889. That history and conclusion is accurate—but only so far as it goes. It does not answer the ultimate question; namely, "Did Minnesota, in initially and continually opting for an elected judiciary, ever opt for a **type** of judicial election system that might compromise either the impartiality and or the appearance of impartiality of its judges?" The answer to that question is unequivocally, "No."

That is why opponents of the Announce clause cannot simply assume, as they do, that Minnesota, by opting to elect its judges, also opted for an election process that would permit judicial candidates to express the same type of campaign speech as legislative or executive candidates. Neither the law nor Minnesota history, fully recounted, supports that assumption.

Nor do they support the corollary assumption, argued under the rubric of "accountability," that Minnesota chose to make judges accountable to the voters in the same manner as legislative and executive officeholders. The term "accountable" merely begs the question, "Accountable for what?" In answer to that question, Minnesota's history again demonstrates that the State never envisioned or embraced a type of "accountability" in which judicial candidates, like legislative and executive candidates, would express their views on issues likely to come before them if elected. Instead, Minnesota adopted a system in which voters could learn—and thus make judicial candidates accountable for—their qualifications, their handling of administrative duties, their views on past appellate court decisions, their judicial philosophy, and their views on a wide-ranging list of topics approved by the Board on Judicial Standards. *See* pp.

22-23 *infra* (listing matters that candidates may freely discuss with voters).

Thus, notwithstanding the State's decision to elect its judges or make them accountable to voters, Minnesota has always retained an undeniable—and undiminished—interest in both the impartiality and the appearance of impartiality of a non-partisan judiciary.

C. The Announce clause serves Minnesota's compelling interests.

1. The Announce clause preserves both the impartiality and the appearance of impartiality of Minnesota's judiciary.

The Eighth Circuit reasoned—and the MSBA fully concurs—that a "judge is placed in an awkward, if not impossible, position" when it comes time to rule on issues which were likely to come before the court but on which he nevertheless expresses his views during the campaign. *See Kelly*, 247 F.3d at 878. If the judge rules consistently with his campaign-expressed views, it may well appear that he prejudged the merits. However, if he rules inconsistently with his campaign-expressed views, then he need fear that the voters may replace him with a candidate who will rule consistently with his campaign-stated views. Either way, at least the appearance of impartiality is compromised.

That judges take oaths does not eliminate this specter of partiality for two reasons.

First, even if campaign-expressed views do not subtract from a judge's actual impartiality, they subtract from his *appearance* of impartiality, which is "an equally important

interest in preserving public confidence in [judicial] independence and impartiality." *See Kelly*, 247 F.3d at 867. There is a reason that Minnesotans feel so much more trust and confidence in the judicial than in the legislative and executive branches of government. (For example, a 1999 survey conducted by an independent market research firm found that 79% felt "trust" in the Minnesota court system, 78% expressed "confidence" in it, 77% thought the courts treated people with "respect," and 84% believed the Minnesota courts "protect people's constitutional rights." 1999-2000 Minnesota Supreme Court Public Opinion of the Courts Study.) The reason is that few Minnesotans see district and appellate court judges acting like politicians. Allowing "general views on disputed legal or political issues" into judicial campaigns would only make judges sound like politicians and undermine public confidence in the impartiality and of its judiciary.

Second, even an oath-conscious judge would be hard-pressed to know at times that he ruled exactly as he would have ruled had he not expressed some view on the issue during his campaign. Given the hundred different ways that a judge can his exercise his discretion, it is impossible for a judge to know that, but for a campaign-expressed view, he exercised his discretion in the same way as if he had announced no views at all. In this respect, Petitioners cannot have it both ways. They cannot, on the one hand, tell a candidate that they need to know how he will exercise his discretion in order to endorse or support him, but on the other hand believe that he will only exercise his discretion impartially. Similarly, they cannot demand to know how a candidate will exercise his discretion in order to make him "accountable" to the public, yet expect the public to believe that he did act impartially when he exercises his discretion exactly as he stated he would during his campaign.

2. The Announce clause also preserves Minnesota's interest in non-partisan elections and other judicial canons.

Although not part of the Eighth Circuit's analysis, the Announce clause is also critical to the future of another compelling state interest—keeping judicial elections non-partisan and other judicial canons viable.

According to Petitioner Wersal, the Republican Party declined to endorse him in 1998 solely because its "delegates could not intelligently evaluate endorsing [his] judicial candidacy without knowing [his] general views on disputed political or legal issues." *See* Wersal Brief at 8.

So what happens to non-partisan elections and other judicial canons if the Announce clause no longer stands in the way of judicial candidates expressing their "general views on disputed political or legal issues"? They would be effectively gutted.

- Attending or speaking at political gatherings—barred by Canon 5(A)(1)(d)—would become meaningless because the candidate could pronounce his "general views on disputed legal or political issues" outside political conventions or gatherings and count on his supporters to carry those views to political groups.
- Party identification, barred by Canon 5(A)(1)(a), would become unimportant to the candidate, for he could now safely assume without saying he is a Republican or Democrat that the public will think he is a Republican or Democrat if endorsed by that party.

- Party endorsement, barred by Canon 5(A)(1)(d), would be far more likely, as Petitioner Wersal concedes, because party conventions would know the judicial candidate's views even if the candidate, technically, could not seek or accept endorsement.

Thus, the Announce clause does far more for Minnesota than foster the impartiality and appearance of impartiality of the judiciary. It also forms a critical thread in the fabric of Judicial Code provisions that keep judicial elections non-partisan in this State. Indeed, it is not too much to say that the entire fabric of Minnesota's non-partisan elections hangs by the Announce clause thread.

II. The Announce Clause, as Construed by the Eighth Circuit, is Narrowly Tailored to Serve Minnesota's Compelling Interests in the Impartiality and the Appearance of Impartiality of Its Non-Partisan Judiciary.

A. The Announce claus is not unconstitutionally overbroad.

Far from a "blanket rule" against campaign speech that makes "silence" the only proper course for a judicial candidate, the Announce clause permits discussion of a wide array of subjects.

1. First, of course, the Announce clause does not preclude judicial candidates from campaigning on their **character, fitness, integrity, education, legal experience, work habits, community service, and ability**. *See* Minn. Stat. § 480B.01.

2. In addition, the Announce clause does not preclude candidates from explaining how they would handle

administrative duties if elected. *See Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979).

3. Further, the Announce clause does not preclude candidates from expressing their views on **past appellate court decisions**. *See* Minn. Bd. on Jud. Standards, Informal Op. 10/10/90; *accord, Kelly*, 247 F.3d at 882.

This fact is particularly important for two reasons. First, Petitioner Wersal claimed below—as one of just two specific, personal harms that the Announce clause inflicted on his 1996 campaign—that he was unable to criticize two Minnesota Supreme Court decisions. *See* Wersal's Brief at 6-7. That claim is—and even then was—groundless; some six years earlier in 1990, the Board on Judicial Standards ("BOJS") had approved candidate discussion of past appellate court decisions. Second, the fact that candidates can discuss past decisions dispels the notion (of Petitioners and their *amici*) that challengers cannot criticize and incumbents cannot defend past appellate court decisions. Similarly, it dispels the corollary notion that incumbents enjoy an unfair advantage over challengers because they can express their legal views in court opinions that challengers cannot criticize.

4. Nor does the Announce clause preclude candidates from stating their **judicial philosophy**. *See Kelly*, 247 F.3d at 882-83 (Eighth Circuit prediction that the Minnesota Supreme Court would conclude that discussions of "a candidate's judicial philosophy do not fall within the scope of the Announce clause"); *accord, In re the Code of Judicial Conduct*, No. C4-85-697 (Minn. S. Ct. Jan. 29, 2002) at 1 (ordering enforcement of the Announce clause as interpreted by the Eighth Circuit).

Again, this fact is critical for two reasons. First, it renders moot the second of the personal harms claimed by

Petitioner Wersal; namely, that he cannot discuss his judicial philosophy. He can. Second, it also renders moot the primary philosophical objection to the Announce clause; namely, that because judges make law by creating and developing the common law and by exercising discretion, a voter should be able to know a candidate's judicial philosophy. *See* RPM Brief at 2. A voter can know—and a candidate can express his—judicial philosophy without violating the Announce clause.

5. Finally, the Announce clause does not preclude candidate discussion of a wide-ranging list of topics. During the 1996 elections, for example, candidates could offer their views on:

- "the most critical issue currently facing the Hennepin County Criminal Justice System";
- the "public disclosure of disciplinary actions" against judges;
- the use of "cameras in the courtroom";
- "the root cause for the high number of juvenile offenders";
- "the length of time it takes to get . . . cases to trial";
- the best ways to spend $50 million "to address the issues of crime and violence";
- the "problem of domestic abuse" and how "to lower the number of domestic assault cases that are being dismissed" before trial;
- the "mission" and "role" of the judge and how to accomplish it;
- the remedies for racial and gender bias;
- the ways to "balance the rights of crime victims and witnesses with the right to confidentiality possessed by juvenile [offenders]";

- the practice of allowing friends and family of criminal defendants to speak at sentencing;
- the balance between "free speech rights [and] the need to control [hate crimes]";
- the criteria for deciding whether to depart from sentencing guidelines;
- the causes for high rates of minority incarceration;
- the offenses that courts should treat as "victimless crimes";
- the remedies for "underrepresentation of women or people of color in the court system";
- "the current system for disciplining lawyers and judges";
- the role of judges "in bringing important legal or judicial issues before the public or the legislature"; and
- the reasons that voters should "support you rather than your opponent".

MSBA Judicial Elections Task Force Report, Appendix C.

Interestingly, many of these subjects, along with past appellate decisions and judicial philosophy, do not substantially differ from the specific examples of speech that Petitioners and their *amici* say that the Announce clause does not—but, in fact, does—permit. *E.g.*, State Supreme Court Justices Brief at 29 ("the weight, or lack thereof, given to victims' interests in sentencing"); *id.* at 30 ("their jurisprudence and the approach they will take to the role of jurist when interpreting laws created by others as well as in potentially creating common-law rules of their own"); *id.* at 30 ("past cases that are no longer pending").

Thus, all that falls within the ambit of the Announce clause after more than 25 years of BOJS, statutory, and court guidance—and just plain common sense—is the expression of views on issues likely to come before the candidate, if elected. So tailored, the Announce clause is not overly broad.

B. The Announce clause is not unconstitutionally vague.

Even if not overly broad, Petitioners claim that the limitation of campaign speech on "issues likely to come before the court" is vague because possibly any issue could come before a court. In making that claim, however, Petitioners ask this Court to require a level of linguistic precision upon which it does not insist in limiting other forms of speech.

Obscenity determinations, for example, turn on whether "the average person, applying contemporary community standards" would find that "the work, taken as a whole, appeals to the prurient interest." *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615 (1973). Even then, the fact-finder must decide whether a reasonable person would conclude that the entire work has serious literary, artistic, political, or scientific value. *Pope v. Illinois*, 481 U.S. 497, 502, 107 S.Ct. 1918, 1921 (1987). Surely, a test that turns on who or what is the "average person," the "community standard," a "prurient interest," a "reasonable person," or literary or artistic value is no less vague than one that turns on what "issues will likely come before the court." Situation-dependent terms do not make a standard inherently vague under the First Amendment.

Indeed, lawyers (and under Minnesota law, all judicial candidates are lawyers) often do situational analyses, *i.e.*, applying legal standards to facts, before advising their clients

to undertake or not undertake a particular action. If they can do it for their clients, they can reasonably do it for themselves.

Moreover, Petitioners' proposal—permitting candidates to express their "general legal views" or their "general views on disputed legal or political issues"—is no less vague than they claim the Announce clause is. What is a "general view"? When is it no longer general or general enough? These questions and others would require the same type of case-by-case determinations that the Announce clause does.[5]

C. The Announce clause is the least restrictive means available to achieve Minnesota's compelling interests fully, practically, and effectively.

Curiously, within all the pages criticizing the Announce clause as not the least restrictive means possible, Petitioners identify very few other means for Minnesota to satisfy its compelling interests. Petitioner Wersal offers none. Petitioner RPM proposes only a few. *See* RPM Brief at 17-18, 37-39. None serve Minnesota's compelling interests as fully, practically, or effectively as the Announce clause.

1. Barring only "pledges or promises" would do nothing to preserve the **appearance** of impartiality of a candidate who, although making no pledges or promises,

[5] The *amici* supporting Petitioners also lack a more clearly defined test for protected campaign speech. Especially curious is the ACLU position. After arguing that the phase "likely to come before the court" is unconstitutionally vague, the ACLU states that a constitutionally acceptable provision "must be limited to speech by judicial candidates that expressly commits them to a particular result in a particular case likely to come before them." *See* ACLU Brief at 3-4. That the ACLU standard also includes a "likely to come before [the court]" clause suggests that the language is not, per se, unconstitutionally vague.

proceeded to express views that left little doubt about how he would rule. A candidate need only incorporate some "magic phrases" at the beginning of every expressed view to avoid making a pledge or promise. For example, even an unimaginative candidate could find a way to say, "Although I cannot promise anything about how I would rule on a law banning state funding of abortion clinics, I believe 'X' about legislative efforts to restrict abortion funding." Nor would it take much creativity for a candidate to say, "I would need to see all the facts in the case before making a decision on a gun control statute, but my general legal view on gun control regulations is 'Y'". Only the Announce clause forecloses this type of end-run and fully, practically, and effectively satisfies Minnesota's compelling interest in preserving the impartiality and the appearance of impartiality of its judiciary.

2. Nor would recusal fully or effectively avoid either actual or apparent judicial partiality. Recusal will prevent partiality and the appearance of impartiality only if the judge voluntarily steps aside. In addition, as Petitioners argue, a judge need only disqualify himself "if there is a bias concerning a party, as distinguished from bias concerning an issue in the case." *See* RPM Brief at 19 (citation omitted). Thus, the law of recusal would not even require a judge to step aside if his bias involved an *issue* on which he expressed campaign views. Moreover, a judge who chooses to recuse himself on a matter on which he had expressed campaign views would risk angering his supporters—in a manner that Petitioners would hold him "accountable"—for failing to "deliver" on his campaign-expressed views. Finally, it hardly serves a state's compelling interest in judicial administration to elect judges who must—or feel it better—to disqualify themselves because they expressed campaign views on issues likely to come before the court.

3. Similarly, affording litigants the right to strike a judge without cause, *see* Minn. R. Civ. P. 63.03, does not fully or effectively satisfy Minnesota's interests in actual and apparent impartiality. The rule affords only one strike, potentially leaving a litigant at the mercy of another judge who may also have expressed campaign views on the matter at issue. The rule requires removal of the judge within 10 days of the judge's assignment, leaving no recourse if the judge first expresses views during a campaign that occurs mid-way through the litigation. Moreover, in Minnesota's rural counties where few (and sometimes only one) judges serve, striking a judge is very difficult for a lawyer who, after all, must appear regularly before that judge. For instance, in over 20 Minnesota counties, there are no more than three judges who serve the county, and oftentimes only one judge actually has chambers in the county. In these counties, removing the judge may irreparably harm the lawyer's relationship with the local judiciary. Further, striking the sole judge in a Minnesota county places undue burden on other counties whose judges must hear the matter.

4. Likewise, the right of appeal—even to a multi-judge panel—does not satisfy Minnesota's compelling interests fully, practically, or effectively. So much of what a trial judge does—whether actually or apparently influenced by views expressed during a campaign—cannot be fixed on appeal. Prior to final judgment in Minnesota, trial court rulings generally are not subject to appellate review. Even after final judgment, many rulings can be reviewed only for abuse of discretion, and findings of fact can be reversed only if clearly erroneous. Moreover, if the partiality or appearance of partiality arises in the court of appeals, further review in the Minnesota Supreme Court would be entirely discretionary. Similarly, review by this Court would be entirely discretionary if the partiality or appearance of

partiality first manifested itself because of the campaign speech of Minnesota Supreme Court justices.

5. Finally, Petitioners argue that a judicial system based on life tenure is somehow less restrictive of free speech rights than the Announce clause. *See* RPM Brief at 38. Ironically, however, a life tenure or appointment/merit selection system would afford candidates like Petitioner Wersal far less freedom of judicial campaign speech because, in a life-tenured or appointed judiciary, there would be no judicial campaigns at all. While the life tenure system might have its merits, Petitioners cannot seriously argue that a system in which there are no judicial campaigns allows more campaign speech. Moreover, even if life-tenured or appointment systems were a less restrictive means, they would not be an "available" means to satisfy the compelling interests of a state that chooses to elect judges. Nor is there any constitutional basis for requiring a state to forego an elected judiciary in order to pursue its compelling interests in the impartiality and the appearance of impartiality of its judiciary.

All in all, none of the other suggested means preserve Minnesota's compelling interests as fully, practically, and effectively as the Announce clause, working in conjunction with the "pledges or promises" clause of Canon 5. Scrutiny of First Amendment speech limitations, although strict, does not constitutionally require a state to settle for a means that will satisfy only some of its compelling interests just some of the time. Nor does it require a state to settle for a means that will satisfy all its compelling interests but only under some circumstances. Minnesota is entitled to a means that fully, practically, and effectively serves its interest in the impartiality and the appearance of impartiality of its non-partisan judiciary. The Announce clause, operating in tandem with the "pledges or promises" clause of Canon 5, is that means.

CONCLUSION

A former Republican governor, Arne H. Carlson, once wrote that if the federal courts strike down the Announce clause, then "[c]andidates for a judgeship could proclaim their disdain or support for any group, partisan position, policy or principle, leaving future litigants with little doubt as to the outcome of their case." That result would subvert the "Founding Fathers [vision of] a judiciary well above the fray of partisan politics, independent from the whims of special interests and the influence of powerful people." It would destroy the public perception of "judges who focused only on the law and facts before them" and who "could be trusted to peacefully resolve the myriad conflicts of humanity and government." Arne H. Carlson, *Justice Should Never Have a Party Label*, Minneapolis Star Trib., Jan. 17, 2002, at A18.

The Minnesota State Bar Association finds both wisdom and common sense in these words and, accordingly, urges the Court to affirm the Eighth Circuit's holding that the Announce clause, as construed by the Eighth Circuit and now adopted by the Minnesota Supreme Court, is constitutional.

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IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Petitioners,

v.

VERNA KELLY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The American Bar Association (ABA), with more than 408,000 members, is the leading national membership organization of the legal profession.[1] Its members come from each of the 50 states, the District of Columbia, and the U.S. territories. Membership is voluntary and includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, law professors, law students, and non-lawyer associates in related fields.[2]

At issue in this case is Minnesota's "announce clause." As interpreted and enforced by Minnesota, the announce clause has the same scope as the corresponding provision in the 1990 ABA Model Code of Judicial Conduct. Both provisions prohibit judicial candidates from committing or appearing to commit themselves on cases, controversies, or issues likely to come before their courts. Thus, the ABA has an interest in defending the constitutionality of these provisions and their applicability to judicial campaigning.

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1. This brief has not been authored as a whole or in part by counsel for a party. No monetary contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, its members, or its counsel. Consent to this brief has been given by all parties and is on file with the Court.

2. Neither this brief nor the decision to file this brief should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

SUMMARY OF THE ARGUMENT

Minnesota's announce clause, as definitively interpreted by the Minnesota Supreme Court, has the same scope as the corresponding provision of the ABA Model Code of Judicial Conduct. The ABA provision, which prohibits judicial candidates from committing or appearing to commit themselves to matters likely to come before the courts, has the long-standing support of a broad spectrum of the American legal profession. The ABA Code's prohibition is narrowly tailored to achieve three compelling state interests – namely, maintaining judicial independence and impartiality, preserving public confidence in the judiciary, and guaranteeing due process to litigants.

ARGUMENT

With increasing frequency, constitutional challenges are being made to legitimate attempts to balance the electorate's right to receive information about candidates for elected judicial office and the need to ensure both the appearance and the reality of an impartial judiciary. The petitioners and respondents have identified certain cases that address challenges to announce clauses,[3] while many other cases

3. *See Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993) (declaring announce rule promulgated by Illinois Supreme Court to be unconstitutional); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 138 (3d Cir. 1991) (upholding constitutionality of announce clause in Pennsylvania Code of Judicial Conduct); *Beshear v. Butt*, 863 F. Supp. 913, 917-18 (E.D. Ark. 1994) (declaring announce clause in Arkansas Code of Judicial Conduct to be unconstitutional); *Am. Civil Liberties Union v. Fla. Bar*, 744 F. Supp. 1094, 1099-1100 (N.D. Fla. 1990) (granting preliminary injunction (Cont'd)

address similar issues concerning limits on judicial campaigning.[4]

(Cont'd)
enjoining enforcement of announce clause of Florida Code of Judicial Conduct); *Deters v. Judicial Retirement & Removal Comm'n*, 873 S.W.2d 200, 203-05 (Ky. 1994) (upholding constitutionality of revised announce clause of Kentucky Code of Judicial Conduct); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky. 1990) (declaring announce clause in Kentucky Code of Judicial Conduct to be unconstitutional); Petition for Writ of Certiorari at 16-18; Respondent's Brief in Opposition at 11-15; Petitioner's Reply at 5-7.

4. *See, e.g., Morial v. Judiciary Comm'n*, 565 F.2d 295, 306-07 (5th Cir. 1977) (upholding constitutionality of provisions of Louisiana statute and Code of Judicial Ethics requiring judges to resign from bench prior to running for elective non-judicial offices); *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1341-43 (N.D. Ga. 2000) (declaring provision of Georgia Code of Judicial Conduct prohibiting false statements to be unconstitutional); *Zeller v. Fla. Bar*, 909 F. Supp. 1518, 1529 (N.D. Fla. 1995) (granting preliminary injunction enjoining enforcement of provisions of Florida Code of Judicial Conduct regulating expenditure and solicitation of judicial campaign funds and solicitation of public support for judicial candidates); *Ackerson v. Ky. Judicial Retirement & Removal Comm'n*, 776 F. Supp. 309, 314-16 (W.D. Ky. 1991) (upholding constitutionality of provision of Kentucky Code of Judicial Conduct prohibiting promises of conduct and statements regarding issues likely to come before court); *Clark v. Burleigh*, 841 P.2d 975, 988 (Cal. 1992) (upholding constitutionality of California statute limiting judicial candidate's statement for inclusion in voter's pamphlet to recitation of candidate's own personal background and qualifications and prohibiting reference to other judicial candidates and other candidates' qualifications, character, or activities); *In re Buckson*, 610 A.2d 203, 222-25 (Del. Ct. Judiciary 1992) (upholding constitutionality of provisions of Delaware Code of Judicial Conduct requiring judges to resign from bench prior to running for elective non-judicial offices and prohibiting (Cont'd)

I.

THE RELATIONSHIP OF MINNESOTA'S ANNOUNCE CLAUSE AND THE ABA MODEL CODE OF JUDICIAL CONDUCT

Minnesota's "announce clause" provides: "A candidate for a judicial office . . . shall not . . . announce his or her views on disputed legal or political issues." MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i). Like many states, Minnesota patterned its Code of Judicial Conduct on the ABA Model Code of Judicial Conduct. Minnesota's announce clause is identical to its counterpart in the 1972 ABA Model Code of Judicial Conduct. *See* ABA MODEL CODE OF JUD. CONDUCT Canon 7(B)(1)(c) (1972).[5] The current ABA Model Code provision on this subject contains somewhat different

(Cont'd)
judges from attending political gatherings); *Summe v. Judicial Retirement & Removal Comm'n*, 947 S.W.2d 42, 47-48 (Ky. 1997) (upholding constitutionality of provision of Kentucky Code of Judicial Conduct prohibiting misrepresentations); *In re Chmura*, 608 N.W.2d 31, 38-43 (Mich. 2000) (declaring provision of Michigan Code of Judicial Conduct prohibiting false statements to be unconstitutional but upholding constitutionality of narrower construction of provision); *In re Broadbelt*, 683 A.2d 543, 552 (N.J. 1996) (per curiam) (upholding constitutionality of provisions of New Jersey Code of Judicial Conduct prohibiting judges from commenting on pending proceedings and from lending prestige of their office to advance private interests of others); *In re Fadeley*, 802 P.2d 31, 44 (Or. 1990) (per curiam) (upholding constitutionality of Oregon Code of Judicial Conduct prohibiting judges from personally soliciting campaign contributions).

5. A survey of the different restrictions on judicial election speech that the states have adopted is set forth in the Appendix to this brief.

language, reading in relevant part that a judicial candidate "shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii) (1990).

As interpreted by the Eighth Circuit, the Minnesota clause "prohibits candidates only from publicly making known how they would decide issues likely to come before them as judges"[6] — the same scope as current ABA Canon 5(A)(3)(d)(ii). Subsequently, the Minnesota Supreme Court issued an order agreeing with that interpretation. *See In re Code of Judicial Conduct*, No. C4-85-697 (Minn. Jan. 29, 2002) ("the announce clause . . . shall be enforced in accordance with the interpretation of that clause by the United States Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*").

Minnesota's announce clause has the same scope as the corresponding provision in the 1990 ABA Model Code — namely, it prevents judicial candidates from seeking political support on the basis of commitments or apparent commitments on how they would decide cases if elected.

6. *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881-82 (8th Cir. 2001).

II.

THE ABA MODEL CODE OF JUDICIAL CONDUCT REFLECTS THE AMERICAN LEGAL PROFESSION'S LONG-STANDING VIEW THAT JUDGES SHOULD NOT CAMPAIGN ON HOW THEY WOULD DECIDE ISSUES, IF ELECTED

The ABA, acting on behalf of the legal profession, has for more than three-quarters of a century promoted model regulations that prohibit judicial candidates from seeking election on the basis of commitments to render decisions in future cases. As early as 1924, its Model Canons of Judicial Ethics cautioned that a candidate for judicial office "should not announce in advance his conclusions of law on disputed issues to secure class support." ABA CANONS OF JUD. ETHICS Canon 30 (1924).

A half-century later, a revised Model Code retained much the same restriction by prohibiting judicial candidates from expressing views on disputed legal or political issues. ABA MODEL CODE OF JUD. CONDUCT Canon 7(B)(1)(c) (1972). The current Model Code narrowed the limitation to "cases, controversies or issues that are likely to come before the court." ABA MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii) (1990).

The history of what became the 1990 Model Code began with a survey of authorities in the field of judicial ethics conducted by the Judicial Code Subcommittee of the ABA's Standing Committee on Ethics and Responsibility. The Subcommittee received assistance from many leading attorneys, judges, legal scholars, and liaisons from ABA entities and other groups with a particular interest in judicial

ethics. Included among those who provided comments were representatives of the ABA Judicial Administration Division Coordinating Committee, the Committee on Codes of Conduct of the Judicial Conference of the United States, the Center for Judicial Conduct Organizations, the American Judicature Society, the Josephson Institute for the Advancement of Ethics, and the Conference of Chief Justices.

The Judicial Code Subcommittee compiled extensive background material, including codes from every United States jurisdiction, law review articles, statistical studies and other research material from the literature of judicial ethics and judicial discipline. Included among those materials were unpublished papers and ongoing research of individuals active in the field of judicial ethics and discipline. The Subcommittee received particular assistance from advisory opinions on judicial ethics that highlighted the problems encountered most often by judges. Finally, the Subcommittee consulted the codes of judicial conduct recently adopted in several jurisdictions and the study materials developed by the drafting committees in those jurisdictions.

In 1987, the Judicial Code Subcommittee circulated a questionnaire with specific questions concerning each section of the seven Canons of the 1972 Code and the Compliance section. The questionnaire was sent to federal and state judges in every jurisdiction, all state judicial conduct organizations, the Conferences of the ABA Judicial Administration Division, the American Judicature Society, and many other interested groups and individuals.

In 1988, the Subcommittee held public hearings at the ABA Midyear and Annual Meetings. Those hearings were attended by members of the judiciary, representatives of

judicial conduct organizations, representatives of a variety of public groups and individuals responding to a general invitation to the public to present oral and written comments to the Subcommittee. All questionnaire responses and other comments were given careful consideration, and many suggestions received were incorporated in the May 1, 1989 Discussion Draft.[7]

More than 4,800 copies of the Discussion Draft, along with a request for comments and suggestions, were distributed to: (1) those to whom the original questionnaire was sent (including state and specialty bar associations); (2) all ABA entities; and (3) many additional federal and state judges. Formal public hearings were held at the 1989 ABA Annual Meeting and, in September 1989, in San Francisco and Washington, D.C. Informational programs on the Discussion Draft were presented to the May 1989 Conference on Professional Responsibility, the Sixth Circuit Judicial Conference, the July 1989 meeting of the Conference of Chief Justices, several state bar meetings, and the meeting of the ABA Judicial Administration Division Coordinating Committee. After that extensive process, the ABA adopted the current 1990 ABA Model Code of Judicial Conduct.

The 1990 Model Code contains a revised version of the announce clause that had appeared in its predecessor, the 1972 Model Code. The 1990 revision to that clause was explained in an earlier Discussion Draft, which noted that the phrase "announce his views on disputed legal or political

7. JUDICIAL CODE SUBCOMM. OF THE ABA STANDING COMM. ON ETHICS & PROF. RESPONSIBILITY, DRAFT REVISIONS TO THE ABA CODE OF JUDICIAL CONDUCT (May 1, 1989).

issues" was "an overly broad restriction on speech."[8] What replaced that phrase was the "more specific language prohibiting the making of any statements that appear improperly to commit the candidate with respect to matters likely to come before the candidate's court."[9]

Thus, the provision of the ABA Model Code that corresponds with Minnesota's announce clause was narrowly drawn after an extensive deliberative process that included a broad spectrum of the American legal profession.

8. *Id.* at 55-56 (May 1, 1989); *see* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50 (1992); M. Peter Moser, *The 1990 ABA Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 731, 765 nn.127 & 129 (1991) (noting eompeting arguments over the language adopted); *see also* Robert M. Brode, Note, Buckley v. Illinois Judicial Inquiry Board *and* Stretton v. Disciplinary Board of the Supreme Court: *First Amendment Limits on Ethical Restrictions of Judicial Candidates' Speech*, 51 WASH. & LEE L. REV. 1085, 1117-21 (1994) (discussing the change to this provision in the 1990 Model Code and predicting that it would pass muster under the Seventh Circuit's analysis in *Buckley*).

9. ABA STANDING COMM. ON ETHICS & PROF. RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES NO. 112 (Aug. 1990); *see* M. Peter Moser, *supra* note 7, at 765 n.127. The only other change ultimately made to the provision was to replace the phrase "cases or controversies" with the phrase "cases, controversies or issues." M. Peter Moser, *supra*.

III.

MINNESOTA'S NARROWLY TAILORED RESTRICTION SERVES COMPELLING STATE INTERESTS

The state "may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Communications of Cal., Inc. v. Fed. Communications Comm'n*, 492 U.S. 115, 126 (1989). Under that standard, Minnesota's announce clause, as interpreted by the Minnesota Supreme Court and the Eighth Circuit, is constitutional.

A. Minnesota's Clause Is Narrowly Tailored

Minnesota's clause proscribes a narrow range of campaign speech by judicial candidates — namely, their statement of how they would decide issues likely to come before the courts. That was the interpretation given to the clause by the Eighth Circuit. *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881-82 (8th Cir. 2001). By recent order, the Minnesota Supreme Court expressly adopted the Eighth Circuit's interpretation. *In re Code of Judicial Conduct*, No. C4-85-697 (Minn. Jan. 29, 2002).

The narrow restriction now imposed by Minnesota received support even from courts that have invalidated broader restrictions on judicial campaign speech. For example, in *Deters v. Judicial Retirement & Removal Commission*, 873 S.W.2d 200, 203-05 (Ky. 1994), the Kentucky Supreme Court upheld language identical to the 1990 ABA Model Code, while earlier invalidating the formulation of the announce clause in the 1972 Model Code

in *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky. 1991). Similarly, in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 230 (7th Cir. 1993), the Seventh Circuit struck down the language identical to the 1972 Model Code, yet the court recognized that "promises to rule in particular ways in particular cases or particular types of cases ... are within the state's regulatory power." Further, in *American Civil Liberties Union of Florida, Inc. v. Florida Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990), the court again held that the announce clause in the 1972 Model Code was too broad, but the court also noted that a judicial candidate "'cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result.'" *Id.* (quoting *Morial v. Judiciary Comm'n*, 565 F.2d 295, 305 (5th Cir. 1977)).

As interpreted, the clause at issue allows judicial candidates to discuss a myriad of proper topics. As in all other states, judicial candidates in Minnesota are free to discuss their qualifications, their opponents' qualifications, their general approach to judicial decisionmaking, and their views on critical issues that relate to their duties of judicial administration, such as court backlog, hiring of court personnel, the need for additional resources, efficiency of the courts, or jury selection and service. *See Editorial: What Judicial Candidates May Say*, AM. JUDICATURE, at 4 (July-Aug. 2000). Candidates are prohibited only from committing or appearing to commit to how they would decide future matters before their courts.

The prohibited statements do not contribute to an informed electorate, as petitioners contend. *See* Brief for Petitioners Republican Party of Minnesota, *et al.* at 29-31; Brief for Petitioners Gregory F. Wersal, *et al.* at 35-38.

If judicial candidates committed themselves to future decisions, they would be subject to disqualification or recusal from making those decisions once they were elected; and any decisions rendered in conformity with prior campaign commitments would likely be subject to challenge on due-process grounds. *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1081-90 (1996) (hereinafter cited as Shepard, *Campaign Speech*).

B. Minnesota's Clause Serves Compelling Interests in Maintaining Judicial Independence and Impartiality, Preserving Public Confidence in the Judiciary, and Guaranteeing Due Process of Law

Ensuring the independence and impartiality of the judiciary is unquestionably a compelling interest that justifies regulation of speech. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991). "[T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process." *Buckley*, 997 F.2d at 231. "A State may also properly protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965).

The proscription in Minnesota's clause reflects the unique role that judges play in American governmental structure. "Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech." *Buckley*, 997 F.2d at 228. "[S]tates need not treat candidates for judicial office the same as candidates for other elective offices" because "the judicial office is

different in key respects from other offices." *Am. Civil Liberties Union of Fla., Inc.*, 744 F. Supp. at 1097.

In deciding cases that come before them, judges are generally bound by controlling precedent or by statutory or constitutional provisions that may apply.[10] America's judges have historically, and properly, been distinguished from officers of the other two branches of government in this most fundamental regard: they must decide cases impartially. Judges do not represent constituencies, as do legislators and executives; and they do not make their judicial decisions with the purpose in mind of pleasing those who have elected them. That fundamental distinction between the judicial branch and the legislative and executive branches is the essence of judicial independence and impartiality, a basic element of the rule of law critical to the American system of justice.

One responsibility of the judiciary in the American experiment in democracy is to check the excesses of factions, as identified by Madison and discussed by Hamilton. *See* THE FEDERALIST No. 10 (James Madison), No. 78 (Alexander Hamilton). The fulfillment of that responsibility requires that the judiciary be able to exert its authority without fear or favor in order to ensure that its legitimacy, dependent on public perceptions of fairness and impartiality in the judicial process, remains intact. *Cf. Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

---

10. Judges are often "confined from molar to molecular motions," being limited to deciding the cases before them with due regard for controlling precedent and legislative intent. *So. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

Permitting judicial candidates to commit or appear to commit themselves in advance on matters likely to come before their courts would create at least the appearance of partiality in the judicial decision-making process. The ultimate result would be to undermine the public's trust in the judiciary's independence and threaten the rule of law.[11] Thus, Minnesota's clause serves the state's compelling interest in preserving public confidence in the judiciary. *Cox*, 379 U.S. at 565.

A third compelling interest implicated here is the guarantee of due process of law. That constitutional guarantee would be threatened if judicial candidates were allowed to make campaign commitments about matters likely to come before their courts. *See* Shepard, *Campaign Speech* at 1083-90; *In re Bybee*, 716 N.E.2d 957, 959-60 (Ind. 1999) (per curiam).

As this Court has recognized, "[t]rial before 'an unbiased judge' is essential to due process." *Johnson v. Miss.*, 403 U.S. 212, 216 (1971) (citation omitted). Thus, in *Tumey v. Ohio*, 273 U.S. 510, 531-35 (1927), the Court held that judges may not share in the fines collected from defendants found guilty in their courts.[12] Such an interest is implicated here,

11. *Cf.* REPORT OF THE PENNSYLVANIA SPECIAL COMM'N TO LIMIT CAMPAIGN EXPENDITURES (1998); REPORT OF THE OHIO CITIZENS COMM. ON JUDICIAL ELECTIONS (1995); SUPREME COURT OF TEXAS, STATE BAR OF TEXAS & TEXAS OFFICE OF COURT ADMIN., THE COURTS AND THE LEGAL PROFESSION IN TEXAS – AN INSIDER'S PERSPECTIVE (1995) (all noting adverse impact on public perceptions of the judiciary caused by contributions to judicial campaigns).

12. *Accord Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823-25 (1986) (vacating judgment that enhanced the legal claim of the justice (Cont'd)

because of a judicial candidate's personal and direct interest in gaining judicial employment.

Invalidating Minnesota's Code provision would prevent the states from making a critical distinction between the election of judges and of other elected officials. Minnesota has a compelling interest in maintaining that distinction, so as to protect the integrity of its courts, preserve public confidence in the judiciary, and guarantee due process rights to all litigants. The state's compelling interest amply justifies its narrowly tailored prohibition of statements by judicial candidates of how they would decide matters likely to come before their courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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who authored the state court's opinion); *Ward v. Village of Monroeville*, 409 U.S. 57, 58-62 (1972) (indirect interest in city's finances was sufficient to bar mayor from serving as judge); *In re Murchison*, 349 U.S. 133, 136-39 (1955) (improper for a judge to serve as a one-person grand jury in matters that came before his court).

APPENDIX

The following states have adopted an "announce" clause substantively the same as the one in the 1972 ABA Model Code: Arizona, ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(1)(d)(iv); Iowa, IOWA CODE OF JUD. CONDUCT Canon 7(B)(1)(c); Maryland, MD. CODE OF JUD. CONDUCT Canon 5(B)(5); Minnesota, MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i); Mississippi, MISS. CODE OF JUD. CONDUCT 7(B)(1)(c); and Pennsylvania, PA. CODE OF JUD. CONDUCT Canon 7(B)(1)(c).

The following states have adopted a "commit" clause substantively the same as the one in the 1990 ABA Model Code: Alaska, ALASKA CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); Arizona, ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(1)(d)(ii); Arkansas, ARK. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); California, CAL. CODE OF JUD. ETHICS Canon 5(B); Florida, FLA. CODE OF JUD. CONDUCT Canon 7(A)(3)(d)(ii); Georgia, GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(c); Illinois, ILL. SUP. CT. R. 67, Canon 7(A)(3)(d)(i); Indiana, IND. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); Kansas, KAN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); Kentucky, KY. SUP. CT. R. 4.300, Canon 5(B)(1)(c); Louisiana, LA. CODE OF JUD. CONDUCT Canon 7(B)(1)(d)(ii); Maine, ME. CODE OF JUD. CONDUCT Canon 5(B)(2)(b); Nebraska, NEB. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); Nevada, NEV. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); New Mexico, N.M. CODE OF JUD. CONDUCT Rule 21-700(B)(4)(b); New York, N.Y. CODE OF JUD. CONDUCT Canon 5(A)(4)(d)(ii); North Dakota, N.D. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); Ohio, OHIO CODE OF JUD. CONDUCT Canon 7(B)(2)(d); Oklahoma, OKLA. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); Rhode Island, R.I. CODE OF JUD.

CONDUCT Canon 5(A)(3)(d)(ii); South Carolina, S.C. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); South Dakota, S.D. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); Tennessee, TENN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); Vermont, VT. CODE OF JUD. CONDUCT Canon 5(B)(4)(b); Washington, WASH. CODE OF JUD. CONDUCT Canon 7(B)(1)(c)(ii); West Virginia, W. VA. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii); and Wyoming, WYO. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii).

The foilowing states use other language in restricting speech in judicial elections: Alabama, ALA. R. JUD. ETHICS Canon 7(B)(1)(c) ("A candidate for judicial office . . . shall not announce in advance the candidate's conclusions of law on pending litigation"); Colorado, COLO. CODE OF JUD. CONDUCT Canon 7(B)(1)(c) ("A judge who is a candidate for retention in office . . . should not . . . announce how the judge would rule on any case or issue that might come before the judge"); Missouri, MO. CODE OF JUD. CONDUCT Canon 5(B)(1)(c) ("A candidate, including an incumbent judge, for a judicial office . . . shall not . . . announce views on disputed legal issues"); Montana, MONT. CANONS OF JUD. ETHICS Canon 30 ("A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination"); New Mexico, N.M. CODE OF JUD. CONDUCT Rule 21-700(B)(4)(c) ("Candidates for election to judicial office . . . shall not . . .

announce how the candidate would rule on any case or issue that may come before the court"); Ohio, OHIO CODE OF JUD. CONDUCT Canon 7(B)(2)(e) ("A judge or judicial candidate shall not do any of the following: . . . Comment on any substantive matter relating to a specific pending case on the docket of a judge"); Texas, TEX. CODE OF JUD. CONDUCT Canon 5(1) ("A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case") & TEX. CODE OF JUD. CONDUCT Canon 5(2)(i) (adopting the "pledges or promises" clause but stating that "a judge or judicial candidate . . . may state a position regarding the conduct of administrative duties"); Wisconsin, WIS. SUP. CT. R. 60.06(3) ("A judge who is a candidate for judicial office shall not make or permit others to make in his or her behalf promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power. A judge shall not do or permit others to do in his or her behalf anything which would commit the judge or appear to commit the judge in advance with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor").

The following states have only the "pledges or promises" clause from the 1972 or 1990 ABA Model Codes: Michigan, MICH. CODE OF JUD. CONDUCT Canon 7(B)(1)(c); North Carolina, N.C. CODE OF JUD. CONDUCT Canon 7(B)(1)(c); Oregon, OR. CODE OF JUD. CONDUCT Canon JR 4-102(B); and Utah, UTAH CODE OF JUD. CONDUCT Canon 5(C)(1).

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In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL.,

Petitioners,

v.

VERNA KELLY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether the State of Minnesota, to foster and preserve the actual and perceived independence and impartiality of its judiciary, may restrict candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges."

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STATEMENT OF THE CASE

I. The Announce Clause.

This case involves a challenge to a critical component of Minnesota's system of selecting state judges, Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, commonly referred to as the "Announce Clause." This provision was promulgated by the Minnesota Supreme Court and applies to candidates for judicial office. It is intended to preserve the actual and perceived independence and objectivity of Minnesota's judiciary.

As construed by the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), the Announce Clause precludes judicial "candidates only from publicly making known how they would decide issues likely to come before them as judges." *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 881-82 (8th Cir. 2001), Petitioners' Appendix to Petition for Writ of Certiorari ("P.A.") 53a. The Eighth Circuit further interpreted the rule to allow judicial candidates to address publicly a wide range of subjects, including, for example, "general discussions of case law or a candidate's judicial philosophy." *Id.* at 882, P.A. 54a.

On January 29, 2002, the Minnesota Supreme Court removed any uncertainty regarding its interpretation of the judicial canon by adopting the Eighth Circuit's construction of the Announce Clause. *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002), Respondents' Appendix ("R.A.") 1. The Minnesota Supreme Court instructed Respondents to enforce the Announce Clause "in accordance with the interpretation of that clause by" the Eighth Circuit. *Id.*, 1-2.

II. States Are Free To Choose from a Variety of Judicial Selection Systems.

Our federal system of government permits each state to determine the manner in which the branches of its government are established and their powers distributed, subject only to the requirement that its government be republican in nature. *See Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). While the methods by which the federal system and the states select and retain judges are different, the goals are the same: "to create and maintain an independent judiciary as free from political, economic and social pressure as possible. . . . " *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992). To that end, 13 states use merit-selection plans, either without any elections or with retention elections where no opposition is permitted;[1] in six states, judges are appointed by the governor or elected by the legislature;[2] and in the remaining states, some or all of the judges are selected through general elections.[3]

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[1] These states are: Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Maryland, Massachusetts, Nebraska, Utah, Vermont and Wyoming. Robert Berness, Note, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 Rutgers L. Rev. 1027, 1034, n.47 (2001) (citations omitted); *see also* American Judicature Society, *Judicial Selection Methods in the States, available at* http://www.ajs.org/select11.html.

[2] These states are: Maine, New Hampshire, New Jersey, Rhode Island, South Carolina and Virginia. *Id. See* Berness, *supra*, note 1; American Judicature Society, *supra*, note 1.

[3] The remaining states select their judges through general elections or have hybrid forms combining merit-selection plans and judicial elections. *Id. See* Berness, *supra*, note 1; American Judicature Society, *supra*, note 1.

III. Minnesota Has Adopted a Blended System That Balances Judicial Accountability with Judicial Independence and Impartiality.

Minnesota has adopted a blended system of judicial selection. *See Peterson*, 490 N.W.2d at 425; *see also* The League of Women Voters of Minnesota, *Choosing Minnesota's Judges* 13 (1998), Appellants' Appendix to the Eighth Circuit Court of Appeals, vol. 2, at 296, 313. This blended system reflects Minnesota's history. In 1857, justices of the Minnesota Supreme Court were elected for seven-year terms so that judicial elections were differentiated from and did not coincide with elections for other offices. *Peterson*, 490 N.W.2d at 420. The 1857 constitution restricted judicial office to persons "learned in the law." Minn. Const. art. 6, § 6 (1857) (currently codified as Minn. Const. art. 6, § 5). Implicit in this restriction is the recognition that judges be subject to the ethical canons of the legal profession. *Peterson*, 490 N.W.2d at 422. The term length of judges was reduced to six years in 1883, which led to highly partisan judicial elections. *Id.* at 420. One such election caused the defeat in 1898 of Justice William Mitchell, described as Minnesota's "greatest judge." 1 Hiram F. Stevens, *The History of the Bench and Bar of Minnesota* 66 (1904). In reaction to concerns with partisan judicial elections, the Minnesota Legislature enacted nonpartisan ballot legislation in 1912 to ensure the "judicial impartiality required to decide cases free from political maneuvering." *Peterson*, 490 N.W.2d at 422.

The emphasis placed by the State on judicial independence and impartiality is further reflected in the Minnesota Constitution, which requires the governor to appoint a successor when a judicial vacancy arises. Minn. Const. art. 6, § 8. In stark contrast, legislative vacancies in Minnesota are immediately filled by special election. Minn. Const. art. 4, § 4. Further, in 1972, at a time when other states were adopting retention elections pursuant to the Missouri Plan, Minnesota extended the time period before a newly appointed judge faced reelection. *Peterson,* 490 N.W.2d at 423. The time frame was extended to the next general election occurring *more than one year* (as opposed to thirty days) following the vacancy, to allow the public sufficient opportunity to evaluate the newly appointed judge's competence. Minn. Const. art. 6, § 8 (*amended* 1972); *Peterson,* 490 N.W.2d at 423. In addition, judicial candidates who are incumbents are designated as such on election ballots. Minn. Stat. § 204B.36, subd. 5 (2000).

To further ensure judicial independence and competence, in 1991 the Minnesota Legislature created a Commission on Judicial Selection, which is composed of members appointed by the governor and by the justices of the Minnesota Supreme Court. Minn. Stat. § 480B.01, subd. 2 (2000). The Commission evaluates the merits of applicants for midterm vacancies and recommends to the governor three to five nominees for each open position. *Id.* at subds. 8, 11. The evaluation criteria are "integrity, maturity, health if job related, judicial temperament, diligence, legal knowledge, ability and experience, and community service." *Id.* at subd. 8.

The Minnesota Supreme Court has characterized the Minnesota judicial selection process as a "middle-of-the-road" approach that blends the open election process with a "quasi-retention feature" that informs the voter which candidate is the incumbent and which is the challenger. *Peterson,* 490 N.W.2d at 425. The court has noted that this blended process "acts as a check on the gubernatorial appointment process by keeping the ultimate choice with the voters while, at the same time, recognizing the independent nature of the judicial function." *Id.*

IV. The Announce Clause Is an Integral Part of Minnesota's Blended Approach to Judicial Selection.

The concept of an announce clause originated more than seventy-five years ago when the American Bar Association ("ABA") adopted Canon 30 of the Model Canons of Judicial Ethics. This Canon provided that a candidate for judicial office "should not announce in advance his conclusions of law on disputed issues to secure class support." ABA Canons of Judicial Ethics Canon 30 (1924), Joint Appendix ("J.A.") 339-40.

The announce clause evolved over the years. In 1972, the ABA drafted a Model Code of Judicial Conduct, which included an announce clause similar to the 1924 version. *See* ABA Model Code of Judicial Conduct Canon 7(B)(1)(c) (1972), J.A. 364. In 1990, the ABA once again updated the Model Code announce clause to prohibit a judicial candidate from making statements that commit or appear to commit the candidate concerning cases, controversies, or issues that are likely to come before the court. *See* ABA Model Code of Judicial Conduct Canon

5(A)(3)(d)(ii) (1990), J.A. 351. Today, most states with elected judiciaries have adopted campaign speech restrictions modeled after either the 1972 or the 1990 Model Code. *Republican Party*, 247 F.3d at 880, P.A. 50a.

V. Petitioners' Challenge to the Announce Clause.

In August 1997, Petitioner Wersal acknowledged: "As a practical matter, the Code allows judicial candidates to discuss their judicial philosophy, such as whether they believe in the strict interpretation of the Constitution, and to criticize prior court decisions. I am able to effectively get out a message without violating even the most restrictive interpretation of the Code." J.A. 44 (August 15, 1997 letter to members of the Constitution Committee of the Republican Party from Wersal).

In February 1998, Petitioner Wersal sought an advisory opinion from the Lawyers Professional Responsibility Board as to whether they would enforce the provisions of Canon 5, which, among other things, contains the Announce Clause. The Lawyers Board advised Petitioner Wersal that he had not provided it with information about any particular statements he wished to make that expressed views on a disputed legal or political issue. *Republican Party*, 247 F.3d at 859, P.A. 12a. A few days after receiving this advisory opinion, Petitioner Wersal filed this action. *Id.*

VI. Proceedings Below.

The district court narrowly construed the Announce Clause to prohibit "discussion of a judicial candidate's

predisposition to issues likely to come before the court." *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999), P.A. 129a. Based on this construction, the district court upheld the Announce Clause because it "serves the state's compelling interest in maintaining the actual and apparent integrity of its judiciary, while not unnecessarily curtailing protected speech." *Id.*

The Eighth Circuit articulated the district court's construction of the Announce Clause as prohibiting judicial candidates "only from publicly making known how they would decide issues likely to come before them as judges." 247 F.3d at 881-82, P.A. 53a. The Eighth Circuit specifically noted that numerous matters can be the subject of public discourse by judicial candidates, including, for example, "general discussions of case law or a candidate's judicial philosophy." *Id.* at 882, P.A. 54a.

In their reply brief filed with the court of appeals, Petitioners for the first time asserted that the district court erred in narrowly construing the Announce Clause. The Eighth Circuit found that Petitioners waived the issue by not raising it in their opening briefs. *Id.* at 881, P.A. 52a. The court of appeals stated further that, if the issue had been properly raised, the court "would not find error in the district court's interpretation." *Id.* at 881, P.A. 52a-53a. The Eighth Circuit concluded that the Announce Clause, as construed, "furthers compelling governmental interests in the independence and actual and perceived impartiality of the judiciary." *Id.* at 881, P.A. 52a. The court of appeals also held that the construed Announce Clause was "narrowly tailored" to further Minnesota's compelling governmental interests. *Id.* at 883, P.A. 56a.

The dissenting court of appeals judge agreed that the Minnesota Supreme Court "may protect its judiciary against both actual and the appearance of impartiality." *Id.* at 903, P.A. 92a. The judge further opined that a Minnesota state court should construe Minnesota state law and the court of appeals "ought not inject ourselves into the state law question." *Id.* at 891, P.A. 71a. The dissent disagreed with the majority about the scope of the Announce Clause, stating that the clause, even as narrowly construed, allows a judicial candidate to say "nothing at all." *Id.* at 894, 899 n.41, P.A. 76a-77a, 85a n.41.

On January 29, 2002, the Minnesota Supreme Court expressly adopted the Eighth Circuit's interpretation of the Announce Clause. *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002), R.A. 1. It therefore directed Respondents to enforce the Announce Clause in accordance with the court of appeals' interpretation of the clause. *Id.*, 1-2.

SUMMARY OF THE ARGUMENT

Minnesota's Announce Clause has been narrowly construed by the court of appeals and by the Minnesota Supreme Court to permit judicial candidates to publicly discuss a wide array of subjects and issues. The only speech restricted by the clause is the announcement by candidates as to how they would decide issues likely to come before them as judges. The Announce Clause is necessary to restrict such announcements to protect the State's compelling governmental interests in an actual and perceived independent and impartial judiciary. These

interests are "undeniably compelling" and of the "highest order." *Republican Party*, 247 F.3d at 864, P.A. 21a. Indeed, the importance of Announce Clause principles was recognized by the Justices of this Court at their respective confirmation hearings.

The State has compelling interests in an independent and impartial judiciary. An independent judiciary – as free as possible from political, economic and social pressure – is an essential element of Minnesota's judicial system. Equally important are the due process rights and justified expectations of Minnesota citizens that impartial judges will preside over cases to which they are parties.

The State also has compelling interests in preserving public confidence in the independence and impartiality of its judiciary. The judicial system depends on the trust of its citizenry to operate and loss of that trust would seriously undermine the judicial system. "Our legal system can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions." *Complaint Concerning Winton*, 350 N.W.2d 337, 340 (Minn. 1984).

Public confidence in the judicial system is completely undermined when candidates publicly announce how they would decide an issue likely to come before them and are later called upon to render a decision in a case involving the issue. Public trust in the judiciary is undermined regardless of whether the judge decides the case consistent with his prior campaign statements. If the judge's decision is consistent with his campaign statements, the judge will be perceived as prejudging the case and not basing the decision on the facts and law of the

case. If the decision contradicts prior campaign statements, the judge will be seen as someone who makes statements merely to get elected without intending to fulfill expectations. In either case, public confidence in the judicial system is severely eroded.

During their confirmation hearings, all of the Justices of this Court recognized and honored the same principles that underlie the Announce Clause. Each acknowledged that a nominee for judicial office must refrain from stating positions on issues likely to come before the Court. This restraint is necessary to preserve the integrity of the judicial process and to promote both the actual and perceived fairness in the judicial system.

The Announce Clause strikes an appropriate balance between the public's right to an actual and perceived independent and impartial judiciary and the First Amendment rights of candidates running for judicial office. Campaign statements are intended to appeal to voters and create expectations as to future performance by the candidate if elected. While candidates for executive or legislative branch offices are expected to make such statements, the very purpose of the judicial function – to decide cases based on the law and facts of each case – is severely compromised if judicial candidates make such statements.

The Announce Clause, as interpreted by the Eighth Circuit and definitively construed by the Minnesota Supreme Court, *In re Code of Judicial Conduct*, R.A. 1, is narrowly tailored to promote the State's compelling interests. Petitioner Wersal himself has acknowledged that he could "effectively get out [his] message without violating

even the most restrictive interpretation of the Code." J.A. 44.

The Announce Clause limits judicial candidates "only from publicly making known how they would decide issues likely to come before them as judges." *Republican Party*, 247 F.3d at 882-83, P.A. 53a; R.A. 1. Judicial candidates are permitted to engage in general discussions of the law and their judicial philosophy. They are also able to discuss or publicize information about a host of other matters including their character, fitness, integrity, background, education, legal experience, work habits, and abilities, all of which are relevant to the determination of a candidate's qualification for office. The Announce Clause *only* restricts speech that *directly* threatens the underpinnings of Minnesota's judicial system.

No less restrictive alternatives to the Announce Clause adequately protect Minnesota's compelling interests. The "pledges or promises" clause in Canon 5 prohibits candidates from making only the most blatant types of statements that threaten the State's interests. That clause simply does not go far enough. A candidate can make many campaign statements that fall short of being pledges or promises but still convey to the public how the candidate will decide issues that are likely to come before the court.

The availability of recusal or disqualification of judges likewise does not adequately protect the State's interests. First, these procedures would not always protect a particular litigant against judicial campaign announcements that prejudged his case. Second, they do not remedy the loss of public confidence in the judicial

system that would result if judicial candidates routinely opined on issues likely to come before them. Further, the widespread use of recusals or disqualifications would severely hamper the State's efforts to maintain an efficiently operating judicial system.

Contrary to Petitioners' claims, life tenure and elimination of judicial elections are also not meaningful alternatives to the Announce Clause. As the Eighth Circuit recognized, the "all or nothing" argument that a state can seek to promote judicial independence *or* it can choose to conduct judicial elections, but not both, is simply unfounded.

Similarly without merit is Petitioners' contention that the Announce Clause, as interpreted by the Eighth Circuit and the Minnesota Supreme Court, is unconstitutionally vague. Under precedent of this Court a law can only be declared unconstitutional for vagueness if people of ordinary intelligence, exercising ordinary common sense, "must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). The import and meaning of the Announce Clause is clear: judicial candidates cannot publicly make known how they will decide cases likely to come before them as judges. The decision of the court of appeals should be affirmed.

ARGUMENT

In holding that the Announce Clause does not violate a judicial candidate's right to freedom of speech under the First and Fourteenth Amendments, the Eighth Circuit

invoked strict scrutiny and examined the clause to determine whether it was narrowly tailored to serve a compelling state interest. *Republican Party*, 247 F.3d at 864, P.A. 20a. The Eighth Circuit appropriately determined that Minnesota's interests in an actual and perceived independent and impartial judiciary were "undeniably compelling" and of the "highest order." *Id.* at 864, P.A. 21a. In addition, the Eighth Circuit correctly concluded that the Announce Clause was "necessary to further" those compelling interests and was "narrowly tailored." *Id.* at 876-77, 883, P.A. 44a, 56a.

The Eighth Circuit described one of the ills to be addressed by the Announce Clause as follows:

> When a candidate is later called upon as a judge to preside over cases involving disputed issues about which he or she has made campaign announcements, the judge is placed in an *awkward, if not impossible, position*. Should the judge properly determine, for example, that a law violates the Constitution, having already expressed this opinion during the campaign, the judge risks appearing as though he or she *prejudged the case rather than gave it due consideration in light of the law, arguments, and facts*. This apparent rigidity can *undermine the faith of the litigants and public* in the judge's decision and in the State's judicial system generally. . . . On the other hand, should the judge reach a conclusion that departs from the opinion expressed during the campaign, the judge risks *being assailed as a dissembler*.

Republican Party, 247 F.3d at 878, P.A. 46a (emphasis added) (citation omitted).

As discussed below, in their confirmation hearings before the United States Senate all of the members of this Court relied upon Announce Clause principles to decline to answer specific questions on issues likely to come before this Court. The Court is now called on to determine whether these same principles will be applicable to future state and federal judges. If the Announce Clause were held invalid as applied to state judges, then the propriety of the use by federal judicial nominees of Announce Clause principles would also be affected.

I. Minnesota Has "Undeniably Compelling" Interests in, and Its Citizens Have a Due Process Right to, the Actual and Perceived Independence and Impartiality of Its Judiciary.

In *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Supreme Court held that the government's compelling interest in restricting a postal worker from participating in elections and campaigns was greater than the postal employee's First Amendment rights to political association. This Court also stated that the government has a compelling interest to make certain that public confidence in government activity is not eroded by the weight of political considerations that would inevitably be imposed on a federal employee by elected officials. *Id.* at 565.

The essence of Petitioners' argument is that the public deserves judges who have less independence and impartiality than their mail carriers. Respondents disagree.

A. The State's Interests in Judicial Independence and Impartiality Are Compelling.

As stated by the Eighth Circuit, "[t]here is simply no question that a judge's ability to apply the law neutrally is a compelling government interest of the highest order." *Republican Party*, 247 F.3d at 864, P.A. 21a. *See, e.g., Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.").

Justice Breyer described the importance of an independent judiciary during his Senate confirmation hearings, when he referred to the way in which the formality of the judicial process symbolizes the importance of an independent judiciary:

> Why is it that judges wear black robes? I have always thought that the reason that a judge wears a black robe is to impress upon the people in the room that a particular judge is not speaking as an individual. In an ideal world, the personality of the judge, the face of the judge, would not be significant because when the judge speaks with a black robe on, in no matter what court, the judge is speaking for the law. And in an ideal world, the law is the same irrespective of the personality of the judge.

Nomination of Stephen G. Breyer to be An Associate Justice of the Supreme Court of the United States: Hearings Before the S.

Comm. on the Judiciary, 103d Cong. 119 (1994) [hereinafter *"Breyer Nomination Hearings"*].

Minnesota has long placed great importance on having an impartial and independent judiciary. As noted by the Minnesota Supreme Court, an independent judiciary is an essential element of Minnesota's judicial selection system:

> The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences. . . . While the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.

Peterson, 490 N.W.2d at 420.

Indeed, citizens have a right guaranteed by the Due Process Clause of the Fourteenth Amendment to an impartial judge. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (holding that Fourteenth Amendment requires judge to impartially apply law); *In re Murchison*, 349 U.S. 133 (1953) (holding that defendant is deprived of due process when judge's involvement in prior proceedings undermine his independence). The State of Minnesota has a compelling government interest in ensuring that these

due process rights are not violated. As Minnesota Supreme Court Justice Loring explained:

> Nothing so shakes the confidence of the people in their courts and arouses contempt for their government, as politically minded judges. There can be no propriety in any influence which tends, consciously or otherwise, to prevent impartiality . . . .

Moon v. Halverson, 206 Minn. 331, 335, 288 N.W. 579, 582 (1939) (Loring, J., concurring specially).

In their Senate confirmation hearings, Justices of this Court have explicitly recognized the need to refrain from making certain statements in order to maintain their impartiality both in appearance and in actuality. For example, Chief Justice Rehnquist underscored the importance of judicial impartiality when he declined to answer questions at his Senate confirmation hearings on such topics as civil rights and public accommodation, wiretapping and surveillance, congressional power to prohibit troops in Laos, and a newspaper's right to advocate violence. *The Nominations of William H. Rehnquist and Lewis F. Powell, Jr. to be Associate Justices of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 34, 39, 56, 141 (1971).

It is well-settled that judicial impartiality and independence are compelling governmental interests that the State is entitled to preserve through such means as the Announce Clause. The Minnesota Supreme Court has long affirmed the importance of these interests to Minnesota's judicial system. Further, these interests are rooted in both the Minnesota and federal constitutions. Thus, they are compelling interests of the "highest order." *Republican Party*, 247 F.3d at 864, P.A. 21a.

B. Minnesota Has Compelling Interests in Preserving Public Confidence in an Independent and Impartial Judiciary.

As the Eighth Circuit stated, and Petitioners do not dispute, "[t]he governmental interest in an independent and impartial judiciary is matched by its equally important interest in preserving public confidence in that independence and impartiality." *Republican Party*, 247 F.3d at 867, P.A. 26a, *citing Cox v. Louisiana*, 379 U.S. 559, 565 (1965) ("A State may also properly protect the judicial process from being misjudged in the minds of the public."); *and Suster v. Marshall*, 149 F.3d 523, 532 (6th Cir. 1998) (stating that the State's interest in preventing judicial corruption or appearance of corruption is compelling). The State has a compelling interest in maintaining a judiciary that appears impartial and independent to litigants and non-litigants alike.

Members of the judiciary are often called on to adjudicate issues of great public concern. "If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery." *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3rd Cir. 1991). As Chief Justice Randall Shepard of the Indiana Supreme Court explained, "for a judicial system to function, it must gain and keep the trust of the citizenry. A loss of faith in the impartiality of the judiciary would destroy it as quickly as actual bias." Randall Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1059 (1996). Indeed, a review of disciplinary cases against judges indicates that most infractions relate not as much to individual acts of

incompetence or favoritism as to conduct that undermines public confidence in the judiciary. *See* Vivi Dilweg, et al., *Modern Judicial Ethics* (1992); Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* (3d ed. 2000).

The Minnesota Supreme Court has recognized the State's compelling interest in judges who not only are independent and impartial, but who also *appear* to be independent and impartial:

> A judge has a position of power and prestige in a democratic society espousing justice for all persons under law. . . . *Our legal system can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions.*

Complaint Concerning Winton, 350 N.W.2d 337, 340 (Minn. 1984) (emphasis added). *See also Letter Carriers*, 413 U.S. at 565 ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.").

II. The Announce Clause As Construed Furthers Minnesota's Compelling Interests and Appropriately Balances Citizens' Rights to a Judiciary That Is and Appears To Be Independent and Impartial with the First Amendment Rights of Judicial Candidates.

As recognized by the Eighth Circuit, the Announce Clause furthers the compelling interests of the State of

Minnesota in the actual and perceived independence[4] and objectivity of the judiciary. *Republican Party*, 247 F.3d at 881, P.A. 52a. In addition, the Announce Clause appropriately balances a judicial candidate's First Amendment rights with the rights of the citizens of Minnesota, including both litigants and non-litigants, to have a judicial system that is, and appears to be, independent and impartial.

A. The Announce Clause Protects Litigants' Due Process Rights to an Independent and Impartial Judiciary.

As discussed above, litigants have a due process right to an independent judiciary. *See Tumey*, 273 U.S. at 523; *In re Murchison*, 349 U.S. at 136; *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (holding that adjudicator's political interest in maintaining the solvency of village "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict . . . .") (quoting *Tumey*, 273 U.S. at 532).

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[4] Petitioners concede that Minnesota has compelling interests in an independent and impartial judiciary. Pet'r RPM Br. at 5-7. Nevertheless, they contend that judicial independence is not implicated in this case because Minnesota's constitution guarantees an independent judiciary. *Id.* at 8. Petitioners themselves recognize, however, that judicial impartiality is linked to judicial independence. *Id.* at 7. Judicial independence arises from a judge's ability to decide cases without the influence of social, political, and economic pressures. *Peterson*, 490 N.W.2d at 420. Such independence of a judge, as well as impartiality, is certainly furthered by the Announce Clause. *See generally Republican Party*, 247 F.3d at 877-881, P.A. 44a-52a.

Courts resolve some of the most important issues in society and in people's lives, including difficult disputes over their freedoms and property rights. Due process requires that litigants have the opportunity to have those disputes resolved by judges only on the basis of the law and facts of the particular case. The responsibility of the courts to afford litigants due process of law is the hallmark of a just society, and the political interests of a judicial candidate should not impede such a fundamental right.

In her confirmation hearings, Justice O'Connor explained why Announce Clause principles are necessary to protect the due process rights of future litigants:

> [I]n one sense we are all the product certainly of our experiences. People assume the role of the judge encumbered, if you will, by the product of those experiences. Judges do, I suppose, as has been pointed out, read newspapers and listen to the radio and watch television to some extent, so all are influenced to some greater or lesser degree by those experiences.
>
> However, *the framework within which a given case is decided should, in my view, be limited to the record and to the briefs and the arguments, and should not really be resolved on the basis of outside social concerns, if you will.*

Nomination of Sandra Day O'Connor: Hearings Before the S. Comm. on the Judiciary, 97th Cong. 131 (1981) (emphasis added).

Indiana Chief Justice Shepard explained that Announce Clause principles represent a careful balance

between a litigant's due process right to an impartial judge and a judicial candidate's right to free speech:

> Should more weight be given to the free speech and political interests of the campaigning judge or to the due process interests of citizens who will appear before this judge? Certainly the free speech value is great, but we cannot forget that litigants come before these judges hoping the disputes involving their families, homes, and personal liberty will be resolved on the basis of the law and the facts alone. One might as easily describe this choice as choosing between cure and prevention. Should the rules restraining speech involving adjudicatory promises be struck down facially, deciding in effect that the price of public disapprobation of judicial officers and of partiality toward future litigants should be paid in the name of free speech? Or should the judge place more value on the ability of courts to afford litigants due process of law in individual cases, and affirm the canons designed to prevent political speeches that will diminish the courts' ability to render impartial justice and their ability to be viewed as partial?

Shepard, *supra*, at 1090-91 (footnote omitted).

Election speech, if it is to be effective, creates expectations of the candidate's future performance. Statements made during the course of a campaign weigh heavily on all political officeholders, but especially on judicial candidates:

> [A] popularly elected judge wins office through a selection system designed to promote electoral accountability, but his office then requires resistance to pressure from those [who] helped elect

> him as well as to those whom the judge will ultimately be responsible in some form of re-election. This problem is most acute upon the eve of an election when, according to one often quoted jurist, ignoring the political consequences of a judicial decision "would be like ignoring a crocodile in your bathtub."

Daniel Burke, *Code of Judicial Conduct Canon 7B(1)(c): Toward the Proper Regulation of Speech in Judicial Campaigns*, 7 Geo. J. Legal Ethics 181, 181-82 (1993) (citation omitted) (footnotes omitted).

Judicial elections differ significantly from legislative or executive elections. The Eighth Circuit noted the substantial differences between judicial offices and legislative and executive offices:

> The functioning of the judicial system differs markedly from those of the executive and legislative. In those areas, the public has the right to know the details of the programs that candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable so that voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by other branches of government.

Republican Party, 247 F.3d at 862, P.A. 17a, *quoting Stretton*, 944 F.2d at 142. *See also Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (noting that judges are different from legislative and executive branch candidates "in ways that bear on [the] strength of the state's

interest in restricting their freedom of speech."); *Berger v. Supreme Court*, No. 87-3935, 1988 WL 114792, at *3 (6th Cir. Oct. 31, 1988) ("[W]e agree with the district court that '[t]he very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office.' ").

In his Senate confirmation hearings, Justice Kennedy recognized these differences between judges and other types of officeholders:

> I think if a judge decides a case because he or she is committed to a result, it destroys confidence in the legal system.
>
> Senators and Representatives are completely free to vote for a particular bill because it favors labor, or because it favors business. That is the way politics works, and that is your prerogative. To identify such an interest, it seems to me, is very candid.
>
> That is improper for a court. The court must base its decision on neutral principles applicable to all parties. That is inconsistent, in my view, with deciding a case because it reaches a particular result.

Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 144 (1987).

The very nature of a campaign for legislative or executive office creates the expectation that candidates for those offices will announce how they will vote on or decide issues that will come before them. This type of campaigning, however, is "fundamentally at odds with

the judges' obligation to render impartial decisions based on the law and facts." *Republican Party*, 247 F.3d at 877, P.A. 44a-45a. As has been recognized:

> Unlike legislators, county commissioners, or executives, judges are compelled by training, inclination, theory, and practice to endeavor to ignore political or economic interests in resolving disputes. . . . Judges also must be isolated from the political pressures and prejudices of society in order to protect individuals and minorities from the tyranny of the majority.

John B. Gates & Charles A. Johnson, *The American Courts: A Critical Assessment* 165 (1991).[5]

Justice Souter observed during his United States Senate confirmation hearings the improper pressure that is placed upon a judge if Announce Clause principles are disregarded, noting that "[a]nything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have, should be off limits to a judge." *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the*

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[5] *See also* The League of Women Voters of Minnesota, *Choosing Minnesota's Judges* 11 (1998), Appellants' Appendix to the Eighth Circuit Court of Appeals, vol. 2, at 296, 311 (citing to statement made by retired Minnesota Supreme Court Chief Justice Sandy Keith) ("A legislator represents and serves a constituency, whereas a judge's constituency is everyone and no one. A judge represents only the law, serves litigants by ruling in accordance with it, and may be called upon to protect the minority from the majority.").

United States: Hearings Before the S. Comm. on the Judiciary, 101st Cong. 194 (1990). He continued:

> Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience.
>
> [I]t is much easier to modify an opinion if one has not already stated it convincingly to someone else.
>
> *[C]an you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?*
>
> You understand the compromise that that would place upon the judicial capacity and that is my reason for having to draw the line.

Id. (emphasis added).

Minnesota's Announce Clause mirrors the restraints that the Justices of this Court believe are essential to ensure a neutral judiciary. If judicial candidates were permitted to publicly make known how they would decide issues likely to come before them as judges, their elections would be no different from campaigns for legislative or executive office. Yet, while legislative or executive candidates may be expected to unabashedly voice their views on particular issues, it is the absence of such statements that ensures the integrity and neutrality of Minnesota's judicial system.

The Announce Clause, as construed by the Minnesota Supreme Court, protects Minnesotans' due process rights to an impartial and independent judiciary. The independence of the judiciary is critical to ensure that all citizens

experience the even hand of justice. The Announce Clause represents an appropriate balance between the campaign-speech rights of judicial candidates and the promise that those who come before the courts in Minnesota will be afforded due process under the law.

B. The Announce Clause Protects the Right of Litigants to a Judiciary That They Perceive As Independent and Impartial.

Restrictions on the First Amendment rights of judges have been found necessary in a variety of circumstances. For instance, a judicial candidate "does not have a First Amendment right to promise to abuse his office." *Republican Party,* 247 F.3d at 862-63, P.A. 18a, *citing Brown v. Hartlage,* 456 U.S. 45, 55 (1982) (stating that certain campaign promises "may be declared illegal without constitutional difficulty"). A judge does not have a First Amendment right to comment to the media about the conduct of parties to a proceeding before the judge, *United States v. Microsoft Corp.,* 253 F.3d 34 (D.C. Cir.), *cert. den.,* 122 S. Ct. 350 (2001); to refer to female lawyers as "lawyerettes," *Complaint Concerning Kirby,* 354 N.W.2d 410 (Minn. 1984); or to make televised statements regarding a murder case pending before a different judge. *In re Porter,* Minn. Bd. on Judicial Standards (1992) (cited in Shaman, *supra,* at 352 n.265). A judge also does not have a First Amendment right to pose for newspaper pictures at a benefit to raise defense money for criminal defendants in his judicial district, *In re Bonin,* 378 N.E.2d 669 (Mass. 1978); to call a district attorney immature, inexperienced, unqualified, and incompetent, *In re Conduct of Schenk,* 870 P.2d 185 (Or. 1994); to accuse non-party corporate officers

of a defendant IUD manufacturer of personal and professional misconduct, *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984); or to say that it would be difficult to impose the death penalty on the murderer of gays or prostitutes because the victims asked for it. *Inquiry Concerning a Judge No. 52*, Unreported Determination (Tex. Comm'n on Judicial Conduct 1989) (cited in Shaman, *supra*, at 352 n.266).

The principle underlying these restrictions on judicial speech is that litigants have a due process right to appear before judges they perceive as independent and impartial. Justice Breyer described the importance of this Announce Clause principle when he declined at his Senate confirmation hearing to answer certain questions regarding issues likely to come before the Court:

> Let us imagine, if I am lucky and if you find me qualified and vote to confirm me, I will be a member of the Supreme Court, and, as a member of that Court, I will consider with an open mind the cases that arise in that Court. And there is nothing more important to a judge than to have an open mind and to listen carefully to the arguments.
>
> I do not want to predict or to commit myself on an open issue that I feel is going to come up in the Court. . . . There are two real reasons.
>
> The first real reason is how often it is when we express ourselves casually or express ourselves without thorough briefing and thorough thought about a matter that I or some other judge might make a mistake. . . . The other reason, which is equally important, is . . . it is so

> important that the clients and the lawyers understand the judges are really open-minded.

Breyer Nomination Hearings, supra, at 114.

Justice Thomas similarly explained the relationship between Announce Clause principles and the need for judges to appear impartial when he declined to answers questions of the United States Senate regarding positions he may take on issues likely to come before this Court:

> [It] is important for any of us who are judges, in areas that are very deeply contested, . . . we have to look ourselves in the mirror and say: Are we impartial or *will we be perceived to be impartial*? I think that to take a position would undermine my ability to be impartial, and I have attempted to avoid that in all areas of my life after I became a judge.

Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 102d Cong. 180 (1991) (Part 1) (emphasis added).

Similarly, Justice Scalia acknowledged the importance of Announce Clause principles, noting at his confirmation hearings that the appearance of his impartiality could be placed in doubt if he were to respond to questions regarding whether he expected to overrule a particular case if confirmed:

> Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that

> he will do this or do that. *I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.*

Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 37 (1986) (emphasis added).

The Announce Clause, as construed by the Minnesota Supreme Court, protects the right of litigants to a judiciary that they perceive as independent and impartial. In this way, it appropriately balances the interests of the candidates in campaign speech with the interests of litigants in adjudication of disputes by judges they perceive as fair.

C. The Announce Clause Furthers the State's Compelling Interest That the Public Have Confidence in an Independent and Impartial Judiciary.

To have confidence in the judicial system, members of the public at large, regardless of whether they ever set foot into a courtroom, must believe their judiciary is impartial and independent. Justice Ginsburg noted the need for public confidence in the judicial system when she referred to Announce Clause principles in declining to answer certain questions in her Senate confirmation hearing:

> Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse

> here what I would say and how I would reason on such questions, I would act injudiciously.
>
> Judges in our system are bound to decide concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. *A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.*

Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 52 (1993) (emphasis added).

Recognizing that a judicial candidate's comments can undermine the public's confidence in the judiciary, Justice Stevens declined to discuss certain issues during his confirmation hearings:

> I really don't think I should discuss this subject generally, Senator. I don't mean to be unresponsive but in all candor I must say that there have been many times in my experience in the last five years where I found that my first reaction to a problem was not the same as the reaction I had when I had the responsibility of decisions and I think that if I were to make comments that were not carefully thought through they might be given significance that they really did not merit.

Nomination of John Paul Stevens, to be a Justice of the Supreme Court: Hearings Before the S. Comm. on the Judiciary, 94th Cong. 26-27 (1975).

The appearance that a judge has predetermined a case is contrary to the public's expectation of fairness and objectivity in the judicial system. *See Stretton*, 944 F.2d at 142. If the judge decides the case in a manner inconsistent with his or her campaign pronouncements, the judge risks being viewed as disingenuous, which also damages the public's perception of the judicial system. *Republican Party*, 247 F.3d at 878, P.A. 46a. Whichever way the judge rules, the loser in the case is the public's faith in the judiciary. The Announce Clause eliminates the dilemma, thereby fostering Minnesota's interest in preserving the public's confidence in the independence and impartiality of its judicial system.

The Announce Clause, as construed by the Minnesota Supreme Court, helps to ensure the right of the public at large to a judicial system in which it has confidence and for which it has respect. In this way, the Announce Clause appropriately balances the First Amendment interests of judicial candidates with the greater interests of the public in the justness of their judicial system.

D. The State of Minnesota Has Demonstrated the Need for the Announce Clause.

In *Burson v. Freeman*, 504 U.S. 191 (1992), this Court detailed the evidentiary support necessary to justify a restriction on speech. *Burson* involved a law that imposed a 100-foot "campaign-free" zone around polling places. The government argued that the zone was intended to

protect against voter intimidation and election fraud. The Court examined the evolution of election reform, including nineteenth-century ballot reforms, the development of restrictions on election day campaigning, and similar polling place restrictions in all 50 states. *Id.* at 202-06. It then determined that this history revealed a "widespread and time-tested consensus" about the problems of voter intimidation and voter fraud. This consensus provided sufficient evidentiary support to justify a "campaign-free" zone around polling places. *Id.* at 206. *See also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

The Eighth Circuit similarly found that Respondents "met their evidentiary burden by offering evidence of widespread and longstanding consensus among members of the bench and bar about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way." *Republican Party*, 247 F.3d at 879, P.A. 49a. This evidence included the 75-year history and evolution of an announce clause as contained in the ABA's Canons of Judicial Ethics; *Peterson v. Stafford*, 490 N.W.2d 418 and *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (Loring, J., concurring specially), which emphasized the long-standing historical concerns for an independent and impartial judiciary; and the existence of similar judicial candidate speech restrictions in

most states. *Republican Party*, 247 F.3d at 879-80, P.A. 49a-51a.[6]

The Eighth Circuit observed that Petitioners offered no evidence to contradict that provided by Respondents. *Id.* at 880, P.A. 51a. Petitioners simply have no basis in law or in fact to claim that Respondents failed to meet their burden of proof.

III. The Announce Clause Is Narrowly Tailored To Further Minnesota's Interests.

The Announce Clause, as construed by the Eighth Circuit and the Minnesota Supreme Court, limits judicial "candidates only from publicly making known how they would decide issues likely to come before them as judges." 247 F.3d at 881-82, P.A. 53a. The Announce Clause is narrowly tailored to promote Minnesota's compelling interests because it is the least restrictive means of serving those interests. *See United States v. Playboy Entm't*

[6] Other evidence provided by Respondents includes the Affidavit of former Republican Governor Arne H. Carlson, who appointed six of the seven justices on the current Minnesota Supreme Court and many lower court judges, J.A. 245, at 247 ¶ 6 ("When citizens find themselves in court, they do not want to appear before judges who are pre-committed to particular positions. The judicial selection and retention process should not mirror the legislative process."); and the Affidavit of A.M. (Sandy) Keith, former Chief Justice of the Minnesota Supreme Court, J.A. 266, at 268 ¶ 6 (explaining that permitting judicial candidates to engage in activities prohibited by Canon 5 "would, in time, damage the public's confidence in the judiciary and put pressure on judges to decide cases in ways that would impress the judge's supporters favorably.").

Group, Inc., 529 U.S. 803, 813 (2000); *Reno v. Amer. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

A. The Announce Clause Is Narrowly Tailored Because There Is No Less Restrictive Alternative That Would Promote the State's Compelling Interests.

Petitioner Wersal has acknowledged that he is "able to effectively get out a message without violating even the most restrictive interpretation of the Code." J.A. 44. Petitioner Wersal's belief that he can "effectively get out a message" underscores that Minnesota's Announce Clause is narrowly tailored.[7]

Judicial candidates in Minnesota are permitted to discuss or publicize information about their character, fitness, integrity, background, education, legal experience, work habits, and abilities, all of which the Minnesota Legislature has determined to be highly pertinent to

[7] Petitioner Wersal's concession also highlights the fact that he has not articulated a particular statement he desires to make that violates the Announce Clause as construed. Therefore, no Article III case or controversy is presented because Petitioner Wersal is not subject to imminent state action for violation of the Announce Clause. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947) (holding that no Article III case or controversy existed because the Court had to speculate as to political activities plaintiffs desired to engage in or statements they desired to make); *Devine v. Robinson*, 131 F. Supp. 2d 963, 969 (N.D. Ill. 2001) (holding that no Article III case or controversy existed because attorneys were not under any imminent risk of attorney ethical rules being enforced against them). *See also* Respondents' Brief in Opposition to Petition for Writ of Certiorari, at 2-5.

a candidate's qualification for office. *See* Minn. Stat. § 480B.01, subd. 8 (2000) (listing criteria by which Commission on Judicial Selection shall evaluate candidates applying for judicial vacancies to be filled by gubernatorial appointment). Additionally, judicial candidates may discuss how they would handle administrative duties if elected. *See Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979).

Even more importantly, judicial candidates in Minnesota may engage in general discussions of the law, as well as their judicial philosophy. *Republican Party*, 247 F.3d at 882, P.A. 54a; *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002), R.A. 1. They may also discuss appellate court decisions, a position set out more than a decade ago in a Judicial Board advisory opinion, which is communicated by letter to all judicial candidates, including Petitioner Wersal. *See* Election Op. Minn. Bd. on Judicial Standards (Oct. 10, 1990), J.A. 62. The Judicial Board has also consistently observed that the Announce Clause allows judicial candidates to respond to a wide array of questions.[8]

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[8] Examples of questions include: "What do you believe to be the most critical issue facing the Hennepin County Criminal Justice System and what do you recommend be done to address it?" Proposed Questions for Judicial Candidates Forums (1996), J.A. 97-103. "As a judge, who are the people you serve and what does it mean to provide good service to them?" *Id.* "Why should voters support you rather than your opponent?" *Id.* "Many victim's advocates have concerns about victim's rights in juvenile court. How would you balance the rights of crime victims and witnesses with the right to confidentiality possessed by juvenile respondents?" *Id.* "If you observed an individual in your courtroom being poorly represented by an unprepared or ineffective lawyer, what would you do?" *Id.* "What is, or will be, your personal mission in your role as judge and how will you go about accomplishing it?" *Id.* "Minnesota is one of a handful of states that does not routinely allow cameras in the courtroom. Where do you stand on this issue and why?" *Id.*

In short, the *only* type of campaign speech that the Announce Clause restricts is public statements regarding how candidates would decide cases likely to come before them. This restriction covers a narrow range of campaign speech. As discussed above, the State has compelling governmental interests in restricting this type of speech because to allow it would compromise judicial impartiality and independence and undermine public confidence in the judiciary. Thus, the Announce Clause is hardly "massively overinclusive"[9] but rather is narrowly tailored to protect the State's compelling interests. *See Stretton*, 944 F.2d at 144; *Berger*, 1988 WL 114792, at *2; *Ackerson v. Kentucky Judicial Retirement and Removal Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991); *Deters v. Judicial Retirement and Removal Comm'n*, 873 S.W.2d 200 (Ky. 1994).

Petitioner Wersal relies on a few cases in which judicial rules from other states were invalidated. *E.g., Buckley*, 997 F.2d at 228-29; *Beshear v. Butt*, 863 F. Supp. 913, 917-18 (E.D. Ark. 1994); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky. 1990). The Eighth Circuit appropriately distinguished these cases, however, because the judicial candidates were able to discuss no more "than their 'name,

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[9] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 428 (2000).

rank, and serial number,' *Buckley*, 997 F.2d at 227, 'biographical data,' *ACLU v. Florida Bar*, 744 F. Supp. at 1098, or 'professional history,' *J.C.J.D.*, 803 S.W.2d at 956. . . . " *Republican Party*, 247 F.3d at 883, P.A. 56a. In contrast, judicial candidates in Minnesota are able to discuss a wide variety of topics. *Supra*, at 27-28.

B. Alternatives to the Announce Clause Proposed by Petitioners Do Not Adequately Promote the State's Compelling Interests.

There are no less restrictive alternatives to the Announce Clause that adequately promote Minnesota's compelling interests. Petitioners' claims to the contrary[10] are based on two faulty premises. The first is that the State's only compelling interest is to protect judicial impartiality in particular cases. Pet'r RPM Br. at 8. In fact, the State's compelling interests in promoting judicial independence and maintaining public confidence in its judiciary encompass more than simply maintaining judicial impartiality in a particular case. *See supra*, at 23-25.

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[10] Petitioners' arguments are also inconsistent with the position they took before the Eighth Circuit that the State could restrict certain announcements of judicial candidates. As Petitioners stated: "[j]udicial candidates and others are constitutionally protected in announcing the views of the candidate on disputed legal and political issues *as long as the announcement does not commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.*" *Republican Party of Minnesota v. Kelly*, No. 98-1652 MNST, Plaintiffs' Memorandum of Law [in support of injunctive relief pursuant to F.R.A.P. Rule 8] (dated March 3, 1998) at 13 (emphasis added).

The second faulty premise on which Petitioners' claims are based is that the Announce Clause has not been narrowly construed and that it prohibits "general discussion" of judicial candidates' views. Pet'r RPM Br. at 4. Petitioners focus their arguments on an unreasonably broad interpretation of the Announce Clause that is not at issue here. As noted above, the Announce Clause addresses more than Petitioners' *de minimus* concept of due process while permitting general discussions of the law and the candidate's judicial philosophy, and a host of other issues. *Supra*, at 23-27.

1. The provision restricting pledges or promises does not adequately protect the State's compelling interests.

Petitioners contend that the "pledges or promises" clause, which prohibits a candidate for judicial office from pledging or promising to rule in a particular way in a particular case or type of case, is more narrowly tailored than the Announce Clause. Pet'r RPM Br. at 37-38. The Eighth Circuit appropriately rejected this argument, concluding that a pledges or promises clause "does not reach the full range of activity that can undermine the State's interests in an independent and impartial judiciary." *Republican Party*, 247 F.3d at 877, P.A. 45a. The court recognized that while a pledges or promises clause addresses the type of campaign conduct that is the most blatant threat to the integrity of the judiciary – blunt pledges by candidates to make specific decisions on the bench – it does not address other types of campaign pronouncements that have the same damaging effect:

> It would not, for example, reach declarations by candidates that legislation relating to hot-button social issues is or is not constitutional. It also would not apply to candidates who publicized their opinions about how unsettled legal issues should be resolved. Both instances raise the specter that the candidates are declaring how they would decide questions that might come before them as judges in order to gain support for their candidacies.

Republican Party, 247 F.3d at 877, P.A. 45a-46a, *citing Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (Rehnquist, J. (Mem. on Motion for Recusal) ("For [a judicial nominee] to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without the benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.")).

Judicial candidates who have made public statements indicating how they will rule on future issues threaten Minnesota's interests in an independent and impartial judiciary and the public's confidence in such a system. For example, consider a Minnesota judicial candidate who publicly states that he believes that the baseball exemption contained in state antitrust laws is "based upon an anachronistic and flawed logic adopted at the turn of the century when baseball was a sport and not a business." Knowing that the future of the Minnesota Twins continues to be in jeopardy as a result of league contraction, this candidate has not made a pledge or promise but, if elected, his statement will surely carry as much political bias into the courtroom as any pledge to

strike down the baseball exemption. Similarly, a judicial candidate who states that no judge should sell out to HMOs by insulating them from liability has not made a pledge, but as a sitting judge, has certainly compromised litigants' confidence in his impartiality on such issues. Likewise, a judicial candidate who says that annoying telemarketers should be criminally liable for violating nuisance laws has not made a pledge but certainly has made an announcement that would taint a telemarketer's confidence if that person becomes the judge assigned to a proceeding involving such an issue. Further, a judicial candidate who states that "all executives of companies who allowed their employees' 401(k) plans to dry up while they got rich should be put in jail for securities fraud" has not made a pledge, but has certainly made an announcement that, if elected, could taint his credibility with a defendant in any such case.

As underscored by these scenarios, the pledges or promises clause does not fully address the type of announcements that undermine Minnesota's compelling interests in a judiciary that is and appears to be impartial and independent to litigants and the public.

2. Recusal and disqualification do not adequately serve Minnesota's compelling interests.

Recusal and disqualification are not adequate alternatives to the Announce Clause. Recusal and disqualification do not sufficiently protect the rights of litigants or even address the State's compelling interest in the public's confidence in its judiciary.

The inadequacy of recusal to address Minnesota's compelling interests is underscored by Justice Kennedy's comments at his confirmation hearings:

> I realize that some Supreme Court nominees have taken the position before this committee that the reason they cannot answer the questions is they have to recuse. I have some trouble with that. I think the reason for our not answering detailed questions with respect to our views on specific cases, or specific constitutional issues, is something quite different.
>
> I think the reason is that *the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, and not because he has taken particular positions on the issues.*

Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 217 (1987) (emphasis added).

Petitioners' claim that the availability of recusal and disqualification, without an Announce Clause, promotes the State's compelling interests as effectively as the Announce Clause is simply unfounded. Pet'r RPM Br. at 38. The existence of disqualification and recusal do not adequately protect a particular litigant's rights when a judge makes campaign announcements prejudging the litigant's case. *See, e.g.*, Shepard, *supra*, at 1081 ("[N]either the federal recusal rule nor the similar ABA rule will provide anything approaching reliable relief to litigants who find their legal fate in the hands of a judge who has promised the voters to rule against them."). Moreover,

recusal would not remedy the loss of confidence the public would have in the judiciary if judicial candidates routinely opined on issues likely to come before them. In such an environment, decisions of judges would always be suspect, as evidenced by the news accounts chronicling the loss of confidence in the Texas judicial system.[11]

Recusal and disqualification are not less restrictive alternatives to the Announce Clause because they do not address a fundamental purpose of campaign speech – to attract votes. The main reason judicial candidates would make statements communicating how they would decide cases likely to come before them is to gain voter approval. Under such circumstances, the public would not anticipate that candidates, if elected, would then disqualify themselves from such cases; indeed, they would expect exactly the opposite. Therefore, such statements would create the impression that the *public*, rather than the individual judge, can essentially decide how certain types of cases should be decided by voting for particular candidates. Such an impression damages not only the public's perception of the independence of the judiciary, but also would undermine the public's respect for the judiciary in that, if disqualification procedures were used effectively, the intent of voters would be thwarted. *See* Shepard,

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[11] Respondents produced news accounts of the dangers partisan judicial elections have posed in Texas. Editorials from Texas newspapers reported a public perception that judicial rulings were influenced by campaign obligations. Affidavit of Mark Levinger, Exs. 6 and 7, Joint Appendix of Defendants/Appellees to the Eighth Circuit Court of Appeals, D.A. 95, 130-32.

supra, at 1082 ("Surely this arrangement would constitute electoral fraud.").

This alternative would also create serious logistical problems and judicial inefficiencies both for litigants and for the State's judiciary. First, it is unlikely that all litigants would have sufficient information about a judge's campaign statements to decide whether a judge should be disqualified. Attorneys vary in their knowledge of judges and in their ability to research a judge's past judicial campaigns and identify all public pronouncements made by the judge during his or her election campaign. Certainly, *pro se* litigants would be particularly disadvantaged. Second, the attorney time needed to research a judge's campaign statements would add to the cost of litigation. Third, not all of a judge's campaign statements are likely to be reported in the media, thereby limiting any meaningful method by which anyone could ascertain the public statements made by the judge expressing his or her position on an issue arising in a particular case.

Finally, widespread recusals and disqualifications would severely hamper the State's ability to maintain an efficiently operating judicial branch. When a judge is disqualified, another judge must be found. Small towns in Minnesota, however, may have only one or two judges. Further, if the Announce Clause were invalidated, competitive pressures during campaigns would eventually result in numerous judicial candidates announcing their views on any number of hotly contested issues, making it difficult even for litigants in larger cities with many judges to find an impartial replacement judge.

3. Life tenure and elimination of judicial elections are not less restrictive alternatives to the Announce Clause.

Petitioners' claims that life tenure and elimination of judicial elections through use of a merit selection or appointment system are less restrictive alternatives to the Announce Clause are not arguments at all, but baldly asserted conclusory statements. The court below categorically dismissed the "all or nothing" argument that a state can seek to promote judicial independence *or* it can choose to conduct judicial elections, but not both. *Republican Party*, 247 F.3d at 865-67; P.A. 22a-26a. Petitioners' suggestions are merely another variation of this theme.

Minnesota's blended approach to judicial selections is deeply rooted in its history and balances judicial independence and impartiality with public accountability. Life tenure of judges or the elimination of judicial elections would directly contravene the will of Minnesota's citizens as reflected in the State's constitution. Most importantly, while the elimination of judicial campaigns may resolve the problem of what restrictions on campaign speech are necessary to promote the State's compelling interests, the speech of judicial nominees would have to be similarly restricted, raising the same tensions at issue here, as recognized by the Justices of this Court in their Senate confirmation proceedings.

C. The Minnesota Supreme Court Has Authoritatively Adopted a Narrow Construction of the Announce Clause.

The Eighth Circuit's construction of the Announce Clause is consistent with the historical application of the clause and is well-supported by case law. *See Stretton*, 944 F.2d at 144; *Berger*, 1988 WL 114792, at *3. The further action of the Minnesota Supreme Court in expressly adopting the court of appeals' interpretation of the Announce Clause removes any question regarding the propriety of this clause's narrowed construction. *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002), R.A. 1. Simply stated, the interpretation of state law has been authoritatively and definitively decided by the Minnesota Supreme Court.[12] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (holding that construction by state court of state law is binding on federal court); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (holding that state court interpretation of state law is binding on federal court as though precise words had been written into the law).

In a last-ditch effort, Petitioners contend that the Eighth Circuit's interpretation of the Announce Clause is

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[12] In any event, the court of appeals correctly decided that Petitioners waived the construction issue by failing to raise it in their opening briefs submitted to the court. *Republican Party*, 247 F.3d at 881, P.A. 52a. The Eighth Circuit also was correct in concluding that, if the issue had been properly raised, the construction was appropriate under the law. *Id.* at 881, P.A. 52a-53a.

unconstitutionally vague. Pet'r RPM Br. at 24; Pet'r Wersal Br. at 41-42. This Court has held, however, that a statute can only be declared unconstitutional for vagueness if men of ordinary intelligence, using ordinary common sense, "must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (citations omitted). As this Court further stated in *Broadrick*,

> Words inevitably contain germs of uncertainty . . . . "[A]lthough the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms the ordinary person exercising *ordinary common sense* can sufficiently understand and comply with . . . . "

413 U.S. at 608 (quoting *Letter Carriers*, 413 U.S. at 578-79) (emphasis added).

The Announce Clause, as construed, clearly allows a judicial candidate of "ordinary intelligence," exercising "ordinary common sense," to comprehend the type of comments that are proscribed by the clause. The meaning of the Announce Clause is clear: judicial candidates cannot publicly make known how they would decide issues likely to come before them as judges. The Justices of this Court had no difficulty applying such a concept in their confirmation hearings. Indeed, a judicial candidate who is familiar with the role of a judge should be able to comprehend the meaning of the Announce Clause as construed.

CONCLUSION

The Eighth Circuit described the horns of the dilemma regarding public statements made by judicial candidates and nominees: after being placed on the bench, the judge must follow his or her statements and be accused of prejudging the case or must ignore the statements and be accused of being a "dissembler." *Republican Party*, 247 F.3d at 878, P.A. 46a. Each Justice of this Court articulated a common principle during their confirmation hearings before the United States Senate, namely, that it would be improper for a judicial nominee to publicly state a position on issues likely to come before the Court.

The decision in this case will have far-reaching consequences. It will affect not only the elections of state court judges, but also the propriety of the use of Announce Clause principles in confirmation hearings of future federal judges. Respondents respectfully request

that this Court affirm the decision of the Eighth Circuit Court of Appeals.

February 19, 2002

Respectfully submitted,

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No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL.,

Petitioners,

v.

VERNA KELLY, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX FOR RESPONDENTS

In re the Code of Judicial Conduct. C4-85-697, Supreme Court Order, January 31, 2002.

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

In re the Code of Judicial Conduct

ORDER

In *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001), *cert. granted*, (U.S. Dec. 3, 2001) (No. 01-521), the United States Court of Appeals for the Eighth Circuit held that the provision in the Minnesota Code of Judicial Conduct that prohibits a candidate for judicial office from announcing "his or her views on disputed legal or political issues," Canon 5(A)(3)(d)(i) (the announce clause), as construed by the district court in *Republican Party of Minnesota v. Kelly*, 63 F. Supp.2d 967 (D. Minn. 1999), is narrowly tailored to further compelling state interests. It has come to the attention of this court that the interpretation of the announce clause by the federal district and appeals courts has given rise to questions about the interpretation of the announce clause by this court. We issue this order adopting the interpretation of the federal court of appeals to clarify our position to the Board on Judicial Standards and the Lawyers Board of Professional Responsibility, which have the first level of responsibility for enforcement of the Canon.

IT IS HEREBY ORDERED that the announce clause of Canon 5(A)(3)(d)(i) shall be enforced in accordance with the interpretation of that clause by the United States

Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001).

Dated: January 29, 2002

BY THE COURT:

/s/ Kathleen A. Blatz
Chief Justice